

# ASBESTOS RELATED BURDENS: SOCIETAL HARMS



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**Asbestos Awareness Australia**



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# ASBESTOS RELATED BURDENS: SOCIETAL HARMS

*'The removal of asbestos is a hazardous and expensive process involving the use of sophisticated machinery and the constant monitoring of fibre levels. The removed asbestos has also to be safely disposed of, which again is expensive'<sup>1</sup>*

Prior papers discuss the human burdens flowing from asbestos activities in Australia and conclude that:

- The estimated death counts from asbestos-related diseases in Australia may have already surpassed 100,000.
- Large scale future fatalities from these diseases are inevitable in coming decades, especially under the current legal and other settings.

Beyond the lives lost, the societal harms caused by decades of intense production and marketing of asbestos containing products in Australia to governments, businesses, builders, and homeowners and renovators will likely accumulate to tens of billions of dollars (and possibly hundreds of billions).<sup>2</sup>

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<sup>1</sup> Jock McCulloch, *Asbestos: Its Human Cost* (1986, St Lucia, Queensland University Press) 248 "Asbestos Cost".

<sup>2</sup> Our researchers as a group are highly qualified and experienced in financial and legal matters and have acted in senior roles as corporate analysts, financial analysts, and policy analysts. Our forecast estimates are based on publicly available data and are in line with estimates made by industry analysts. See, eg, *Asbestos Cost* 244-248.; Jock McCulloch and Geoffrey Tweedale, *Defending the Indefensible: The Global Asbestos Industry and its Fight for Survival* (2008, Oxford University Press, Oxford) 204 "Defending the Indefensible". McCulloch and Tweedale cite an industry analyst in the United States estimating the cost of asbestos removal alone over the next 25 years at US\$100 billion.

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## What Are the Societal and Financial Harms Arising from The Asbestos Crisis in Australia?

**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<sup>3</sup> and is considerably more expansive than “damages” that might be compensable under law. 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.<sup>4</sup>**

**The societal impacts of legacy asbestos in Australia include, but are not limited to, the following:**

- 1. The costs to compensate or care for sufferers of asbestos related diseases.**
- 2. The costs of research to find a cure or treatments for asbestos-related diseases.<sup>5</sup>**
- 3. The costs of communicating to the community about the health risks of asbestos and the appropriate precautions to mitigate these risks.<sup>6</sup>**
- 4. The costs to identify, risk assess and manage legacy asbestos in buildings and land (including government, commercial and residential properties).<sup>7</sup>**
- 5. The removal of identified asbestos threats in these properties.<sup>8</sup>**
- 6. The remediation of asbestos related industrial sites.<sup>9</sup>**

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<sup>3</sup> GRI, *Consolidated Set of GRI Sustainability Reporting Standards 2020*.

<sup>4</sup> GRI, *Consolidated Set of GRI Sustainability Reporting Standards 2020* 44.

<sup>5</sup> Our research suggests that industry and government funding for the purpose of research of asbestos related diseases is negligible, especially for mesothelioma research. This topic will be discussed more fully in a later paper.

<sup>6</sup> Our research suggests industry and government funding for the purpose of raising public awareness of asbestos threats is minimal and is reflected in the poor levels of public awareness and knowledge. This topic will be discussed more fully in a later paper.

<sup>7</sup> See, eg, Mark Genever, Matthew Allan and Steven Bos, *Case Studies of Significant Asbestos Removal Projects* (Commissioned by the Asbestos Safety and Eradication Agency “ASEA”, 2017).

<sup>8</sup> See, eg, Mark Genever, Matthew Allan and Steven Bos, *Case Studies of Significant Asbestos Removal Projects* (Commissioned by the ASEA, 2017).

<sup>9</sup> See, eg, Mark Genever, Matthew Allan and Steven Bos, *Case Studies of Asbestos Contaminated Land* (Commissioned by the ASEA, 2017).

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## 7. The costs to landfill waste containing asbestos.

Our research found no scholarly sources that discuss these economic, environmental, and societal impacts in detail (beyond item one) and publicly available official sources on these costings are limited.

### Corporate Externalities

The primary companies who mined asbestos and or manufactured and marketed materials containing asbestos in Australia were James Hardie Industries Ltd “James Hardie”, CSR Ltd “CSR” and Wunderlich Ltd (with the latter company held within the James Hardie and CSR groups at various times).<sup>10</sup> Today, James Hardie and CSR are highly profitable publicly listed corporations that continue to manufacture and sell building products in Australia and elsewhere.<sup>11</sup>

Our research suggests most of the societal burdens flowing from asbestos related activity in Australia were ignored or dismissed when the mining, manufacturing and associated policy decisions were made. Today, most of these burdens are borne by taxpayers, the general business sector, homeowners, and uncompensated victims rather than by James Hardie or CSR. In economic and financial nomenclature, such costs are known as corporate externalities.

Corporate externalities arise when a relevant corporation shifts the costs of harms caused by its actions and activities to persons beyond the legal and operational company structure.<sup>12</sup> Externalities are common within the corporate world because companies that can force others to pay the bills for their adverse impact on society can enhance their own profits.<sup>13</sup> This pattern of creating externalities can undermine free market arguments that the relatively unimpeded corporate pursuit of profits is

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<sup>10</sup> CSR Ltd, *Annual Report 2019* 72.

<sup>11</sup> James Hardie Industries Ltd, *Annual Review Fiscal 2020*; CSR Ltd, *Annual Report 2020*.

<sup>12</sup> See, eg, Daniel Chow, ‘Counterfeiting as an Externality Imposed by Multinational Companies on Developing Countries’ (2011) 51 *Virginia Journal of International Law* 785.

<sup>13</sup> Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable & Robinson Ltd, 2004) 70.

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**beneficial for society, and can justify more intrusive regulatory intervention in, and regulatory consequences for, harmful corporate activities.<sup>14</sup>**

**The scale of societal harms resulting from the mining and use of asbestos in Australia emerges through detailed analysis of academic and public data sources and from discussion with government bodies, companies, asbestos abatement professionals and others.**

## **Public Sector Costs**

**Australian taxpayers are funding bills to identify, risk assess, and remediate or remove legacy asbestos from buildings and infrastructure owned by the state and federal governments, including from offices, hospitals, train stations, community centres, prisons, and TAFEs.<sup>15</sup>**

**For example, in the 1980s the removal of asbestos from a single building at Narrabunda College in Canberra was \$700,000 and the Department of Housing and Construction confirmed that this cost level was representative of the asbestos removal costs in other buildings.<sup>16</sup> Jock McTulloch outlines further case studies of asbestos removal from public buildings around Australia, and concludes, that in all cases, the costs involved ran into millions of dollars.<sup>17</sup>**

**More recently:**

- **Northern Territory taxpayers contributed approximately \$45 million to remove**

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<sup>14</sup> See discussion in John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Corporate Law* (1995, Oxford University Press). See also Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable & Robinson Ltd, 2004) 161-164.

<sup>15</sup> See, eg, Victorian Asbestos Eradication Agency, 'Scope of the VAEA's Work' viewed 23 June 2021 <https://www.vaea.vic.gov.au/scope>.

<sup>16</sup> Asbestos Cost 246-248. See also Mark Genever, Matthew Allan and Steven Bos, *Case Studies of Significant Asbestos Removal Projects* (Commissioned by ASEA, 2017). Pg 31 states that the South Australian Government paid approximately \$800,000 to remove asbestos from the former Balfour's building in the central business district of Adelaide.

<sup>17</sup> Asbestos Cost 248.

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asbestos from 54 remote indigenous communities.<sup>18</sup>

- Taxpayers in the ACT Government paid approximately \$3.5 million to remove asbestos from the Lyneham Sports Precinct.<sup>19</sup>
- The ACT Government and the National Capital Authority provided funding of \$15 million to remove asbestos and develop infrastructure on land in central Canberra that was subsequently sold.<sup>20</sup>
- Australian taxpayers via the federal government paid \$31.5 million to remediate land on the Cox Peninsula that had been used for maritime, communication and defence purposes, with asbestos management forming a part of the project cost.<sup>21</sup>

Gray et al conducted telephone interviews with asbestos removalists and assessors and environmental health officers across Australia in 2015. They found that removalists servicing government and commercial properties removed larger amounts of asbestos containing materials than those working in residential properties. Some of the removalists and environmental health officers highlighted schools and prisons of particular concern, due to the age of the buildings. Others indicated that social housing often contained significant amounts of asbestos.<sup>22</sup>

Victorian taxpayers have already paid 379 million dollars to identify, assess and eradicate asbestos in public schools and this program is not yet complete.<sup>23</sup> Assuming similar costs for public schools across other Australian States, and

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<sup>18</sup> Mark Genever, Matthew Allan and Steven Bos, *Case Studies of Significant Asbestos Removal Projects* (Commissioned by ASEA, 2017) 74.

<sup>19</sup> Mark Genever, Matthew Allan and Steven Bos, *Case Studies of Asbestos Contaminated Land* (Commissioned by the Asbestos Safety and Eradication Agency "ASEA", 2017) 30.

<sup>20</sup> Mark Genever, Matthew Allan and Steven Bos, *Case Studies of Asbestos Contaminated Land* (Commissioned by the Asbestos Safety and Eradication Agency "ASEA", 2017) 10.

<sup>21</sup> Mark Genever, Matthew Allan and Steven Bos, *Case Studies of Asbestos Contaminated Land* (Commissioned by the Asbestos Safety and Eradication Agency "ASEA", 2017) 18.

<sup>22</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, 294.

<sup>23</sup> Victorian School Building Authority, 'Asbestos Safety Program', viewed 23 June 2021 at <https://www.schoolbuildings.vic.gov.au/Pages/Asbestos-removal-from-schools.aspx>.

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equivalent costs for private schools, the bill for removal or remediation of asbestos in Australian schools may exceed two billion dollars.<sup>24</sup>

The costs to replace or remediate asbestos from infrastructure sites and assets are high. For example, the states (or their water consumers) will pay an estimated \$8 billion to upgrade water pipes containing asbestos that are now 50 to 70 years old.<sup>25</sup>

Further large sums are being spent by States and local councils to remediate industrial sites contaminated with asbestos and abandoned residential properties containing decayed asbestos, and to landfill asbestos waste.<sup>26</sup> For example, the township of Wittenoom has been declared a contaminated site but has not been fully remediated because of the costs and difficulties involved.<sup>27</sup> And in 2011, the NSW Government provided funding of \$6.3 million across three financial years to address the most significant health, safety and environmental issues at the Woodsreef Mine.<sup>28</sup>

Dumping of hazardous asbestos is also a major problem. The Asbestos Safety and Eradication Agency “ASEA” estimates that 6,300 tonnes of asbestos are dumped illegally each year, and a commissioned study estimates the associated costs at more than \$8 million per annum.<sup>29</sup> Common dumping grounds include reserves, bushland,

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<sup>24</sup> Close to two-thirds of Australian students were enrolled in government schools and one third in private schools at the end of 2020. So, the total estimated cost for all Victorian schools is 578 million (based on the proportion of public versus private students) and the total estimated cost to remove asbestos from all Australian schools is more than 2.2 billion dollars (based on the population ratios): Australian Bureau of Statistics, ‘National, state and territory population 31 December 2020’ viewed 26 June 2021 at <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release#states-and-territories>. Victoria population was 6.7 million and Australia 25.7 million. Australian Bureau of Statistics, Schools, Australia, 2020 at <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4221.0>.

<sup>25</sup> Matt Peacock, ‘Asbestos-laden Water Piping “Needs Upgrading Cost of \$8 Billion”’ *abcnews online* 28 March 2016. Most of these water pipes were manufactured by James Hardie.

<sup>26</sup> See, eg, Lenore Layman, ‘Asbestos in the Built Environment’ in Lenore Layman and Gail Phillips (eds), *Asbestos in Australia* (Monash University Publishing, 2019) 68-69, 73 “Asbestos in Australia”.

<sup>27</sup> See, eg, Layman, ‘Asbestos in the Built Environment’ in *Asbestos in Australia* 73.

<sup>28</sup> NSW Government, ‘Woodsreef Mine’ viewed 30 June 2021 at <https://www.resourcesandgeoscience.nsw.gov.au/landholders-and-community/minerals-and-coal/legacy-mines-program/woodsreef-mine-major-rehabilitation-project>.

<sup>29</sup> ASEA, ‘Illegal Asbestos Dumping: Review of Issues and Initiatives’ (Prepared by ACIL Allen Consulting, 16 March 2016).

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forests, parks, near schools, on unused land blocks, in skips, and within demolition waste and green waste.<sup>30</sup>

## Commercial Sector Costs

Large scale costs have been incurred, or will arise, for millions of large and smaller private institutions and businesses across Australia including corporations, universities, private hospitals, factories, utilities, and land developers.<sup>31</sup>

Since 2011, most employers are required under state-based workplace health and safety law to monitor and control *in situ* asbestos threats on a continuing basis.<sup>32</sup> When interim management of identified asbestos is no longer safe for some reason, the capital costs to remove or remediate it add to the prior management costs.

In a study commissioned by the ASEA, Behrens and Tunny found that there is a strong business case for prioritised removal of asbestos from properties.<sup>33</sup> Commercial participants indicated that the strongest factor influencing their decision to remove asbestos was a long-term reduction in asbestos-related diseases, highlighting the criticality of the value accorded to the saving of human life.<sup>34</sup>

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<sup>30</sup> ASEA, 'Illegal Asbestos Dumping: Review of Issues and Initiatives' (Prepared by ACIL Allen Consulting, 16 March 2016) 16-17.

<sup>31</sup>As of June 30, 2020, there were 2.4 million actively trading businesses in Australia: Australian Bureau of Statistics, 'Counts of Australian Businesses, including Entries and Exits' viewed 28 June 2021 at <https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/latest-release>.

<sup>32</sup> These laws will be discussed in later papers.

<sup>33</sup> Nick Behrens and Gene Tunny, 'Return on Investment to Enable Safe Prioritised Asbestos Removal in Australia' (ASEA Reports, 2014). Behrens et al highlight the benefits of an asbestos removal programme, including avoided costs and increased land value and productivity. The avoided costs include: the 5 yearly reviews of asbestos management plans and asbestos registers, the audits or inspections of asbestos registers, lower maintenance and repair costs, lower staff training costs, lower insurance premiums, lower cost of service interruptions, lower litigation costs, reduced workers compensations premiums, and lower costs to replace the asbestos now rather than in the future.

<sup>34</sup> Nick Behrens and Gene Tunny, 'Return on Investment to Enable Safe Prioritised Asbestos Removal in Australia' (Commissioned by the ASEA, 2014) 18.

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**Nonetheless, the study concluded that most businesses are opting for management of *in situ* asbestos and are deterred by the significant upfront costs of asbestos removal.<sup>35</sup>**

**We forecast that total costs for public and commercial bodies to manage, remediate and or eradicate legacy asbestos will reach tens of billions of dollars over time (and possibly hundreds of billions).<sup>36</sup>**

## Residential Sector Costs

**On top of these figures, there are more than ten million residences across Australia.<sup>37</sup> Assuming one third of these contain asbestos,<sup>38</sup> and a conservative cost of three thousand dollars to assess, manage and or eradicate identified threats in each of these properties,<sup>39</sup> the total damages bill for residential owners will likely eventually amount to another ten billion dollars.**

**The costs and sources of potential harm within homes is made worse by use of asbestos waste in driveways, paths, and garage floors.<sup>40</sup> James Hardie sold asbestos waste or gave it away until the 1970s, and when in place, it can be difficult to differentiate from concrete.<sup>41</sup>**

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<sup>35</sup> Nick Behrens and Gene Tunny, 'Return on Investment to Enable Safe Prioritised Asbestos Removal in Australia' (Commissioned by the ASEA, 2014) 17.

<sup>36</sup> Asbestos Cost 248.

<sup>37</sup> As at March 31 2021 there were more than 10.6 million residences in Australia: Australian Bureau of Statistics, 6416.0 - Residential Property Price Indexes: Eight Capital Cities (March 2021) <https://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/6416.0?OpenDocument>.

<sup>38</sup> The actual scale of residential properties containing asbestos in Australia is unknown because nobody is collecting or requiring such data.

<sup>39</sup> Asbestos removalists that our researchers spoke to suggested that \$3000 would generally only pay for the removal of asbestos from one room such as a bathroom or kitchen.

<sup>40</sup> Matt Peacock, *Killer Company* (Harper Collins Publishers, 2009) 292 "Killer Company".

<sup>41</sup> *Killer Company* 292.

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## What Costs Have Covered by James Hardie and CSR?

**You may think that James Hardie and CSR should be responsible for all foreseeable harms caused by their actions (and the associated research costs to mitigate these harms). This level of accountability has not yet occurred.**

### **Personal injury costs**

**Following an announcement by James Hardie in 2001 that it planned to move its headquarters to the Netherlands and restrict the amount of monies available to asbestos-related victims, the levels of organised public protest and media scrutiny were intense and confrontational.<sup>42</sup> This scenario pressured James Hardie and the NSW State Government, and ultimately led to the establishment of the Asbestos Injury Compensation Fund “AICF” in 2006.<sup>43</sup> Under this fund 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 applied if claims escalate.<sup>44</sup>**

**The 2020 annual review from James Hardie indicates that the company’s cumulative contributions to asbestos compensation to July 2020 totalled around \$1.6 billion.<sup>45</sup> Most of this amount is likely to be personal injury payments paid through the AICF.**

**The levels of personal injury and other forms of compensation paid by CSR and Wunderlich Ltd are not reported publicly. The notes of the financial report of CSR for the year to end of March 2020 suggest these payments total less than a billion**

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<sup>42</sup> See, eg, Greg Combet, ‘The Bernie Banton Story’ in Asbestos in Australia.

<sup>43</sup> James Hardie Compensation Agreement. Recital A(m) states 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: Killer Company, 284.

<sup>44</sup> James Hardie Compensation Agreement Schedule 3.

<sup>45</sup> James Hardie, *2020 Annual Report* 33. 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. 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.

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dollars. If this estimate is broadly accurate, total compensation paid by James Hardie and CSR to end of March 2020 totalled less than three billion dollars pre-tax, with most of this money comprised of compensation paid to some of the people suffering from asbestos-related illnesses.

**The notion that all sufferers of asbestos-related diseases in Australia receive compensation is a commonly held myth.**<sup>46</sup> In fact, the present compensation schemes (including those funded by James Hardie and CSR) provide payments only when victims can prove their claims under the relevant scheme, and this is not always possible.

Claims data suggests very few sufferers of asbestos-related lung cancer receive compensation.<sup>47</sup> The causal factors of this condition are complex and difficult to legally establish. There are also mesothelioma sufferers who remain uncompensated because they cannot demonstrate the required legal elements.<sup>48</sup>

These uncompensated victims must generally rely on taxpayer funded health and other services and the costs of these services are externalities created by the asbestos crisis.

### **Asbestos disease research**

The only contributions from James Hardie and CSR to asbestos-related disease research that our researchers are aware of was negotiated under the AICF. Under

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<sup>46</sup> This belief has been expressed to us many times by medical professionals, lawyers, and others.

<sup>47</sup> See, eg, 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); 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).

<sup>48</sup> It is especially difficult for people who were exposed from non-occupational sources to prove their claims because they must be able to identify the likely source of harmful exposure, including the premises where it occurred and the manufacturer or distributor of the relevant product. Demonstrating these facts is complex, or sometimes not possible, for example, when the person has engaged in multiple renovations during the latency period, and or has moved from the relevant property, and or has lived in more than one country. Even if a sufferer can demonstrate these facts, the relevant manufacturer or distributor must still operate with available funds to sue upon. See, eg, Tanya Segelov, *The “Third Wave” of Asbestos Victims: Challenges for Litigators’* (2015) 131 *Precedent* 12.

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**this agreement, James Hardie committed to contribute \$500,000 per annum over ten years to mesothelioma research.<sup>49</sup> The beneficiaries of this money are unknown.**

**In any event, this level of research funding from the industry seems minimal given the historical and ongoing levels of human suffering and deaths resulting from its activities.**

### **Community awareness campaigns**

**Neither James Hardie nor CSR have funded comprehensive national public health campaigns that warn about the risks of exposure to legacy asbestos and that provide practical advice on how to avoid or mitigate these risks.**

**The only known contributions and efforts from James Hardie and CSR that seek to enhance community awareness of the risks and impacts of legacy asbestos were negotiated under the AICF.<sup>50</sup> Under this agreement, James Hardie were obliged to contribute \$75,000 per annum over ten years for asbestos awareness programs.<sup>51</sup> This money was used, at least in part, to assist with the establishment of a website with the URL of [asbestosawareness.com.au](http://asbestosawareness.com.au).<sup>52</sup>**

**Our household survey results suggest the efficacy of this website has been limited.<sup>53</sup> Its online guidance assumes that Australians are sufficiently aware of the dangers of asbestos to proactively search for and locate this advice, and have the capacity to appropriately respond. Yet, our survey found that more than two thirds of the 43,000 household respondents could not positively identify asbestos as dangerous to health.<sup>54</sup>**

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<sup>49</sup> James Hardie Compensation Agreement [20]. We welcome notifications of further contributions.

<sup>50</sup> We welcome notifications of further contributions.

<sup>51</sup> James Hardie Compensation Agreement [19].

<sup>52</sup> Asbestos Awareness.com.au, 'Don't Play Renovation Roulette' viewed 28 March 2021 at <http://www.asbestosawareness.com.au/index.php?runonce=1>.

<sup>53</sup> See also Werfel Case [281-286].

<sup>54</sup> See Digital Finance Analytics and Asbestos Awareness Australia Ltd, *Community Awareness & Knowledge Of Asbestos Threats & Consequences* (March 2021) available at <https://digitalfinanceanalytics.com/blog/the-silent-killer-you-need-to-know-about/>.

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## Legacy asbestos in properties

James Hardie and CSR are not paying for most of the property related burdens arising from legacy asbestos, such as the costs to identify, risk assess, remediate, and remove it from government, commercial and residential properties.

James Hardie was aware of its potential liability for property related costs and successfully negotiated for important concessions in the AICF agreement. This agreement states that James Hardie is not liable for ‘claims for economic loss ... or loss of property, including those relating to ... asbestos or asbestos products removal ...’<sup>55</sup>

James Hardie was also aware of their potential liability for remediation costs. In 2001, the litigation manager of James Hardie warned the company that the ‘establishment of a broadly defined duty to remediate, whether at common law or by statute, could have a catastrophic effect on the company’.<sup>56</sup> The company (or its lawyers) sought to minimise these potential costs. The AICF agreement states that James Hardie is not liable for ‘claims for economic loss ... or loss of property, including those relating to land remediation’.<sup>57</sup>

The NSW State Government further agreed in the AICF that it will not undertake ‘any adverse legislative action’ or ‘adverse regulatory action’ against James Hardie.<sup>58</sup> The true nature and scope of these clauses are unclear. In our view, these concessions raise serious questions about the capacity of the NSW Government to act in the best interests of all NSW constituents rather than for the benefit of James Hardie.

The discussed concessions in the AICF were seminal and restrict (but may not entirely prevent) the future capacity of the NSW Government to recover property costs associated with legacy asbestos.<sup>59</sup> Specifically, the AICF agreement prevents or

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<sup>55</sup> James Hardie Compensation Agreement [8.2(b)(iii)]

<sup>56</sup> Killer Company 293 citing Jackson Report exhibit 10.

<sup>57</sup> James Hardie Compensation Agreement [8.2(b)(iii)]

<sup>58</sup> James Hardie Compensation Agreement [13.2-13.3].

<sup>59</sup> Pg 162 of the 2021 annual report of James Hardie (prepared in accordance with the disclosure obligations in the United States) indicates that ‘there is a possibility that, despite certain covenants agreed to by the NSW Government in the AFAA

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**makes it difficult for the NSW Government to legally require funding from James Hardie to support the identification, remediation, and removal of asbestos from properties and or to recover other economic losses.**

**While other states and territories are not signatories to the AICF agreement, the AICF pays compensation to sufferers of asbestos related diseases across Australia and not only to those exposed or residing in NSW. If these other states or territories were to attempt to claim for property-related costs from James Hardie, this arrangement could be put in jeopardy. Whether future actions will be sought to recover economic losses from CSR is uncertain. We are not aware of such actions to date.**

**To summarise, to the end of March 2020, James Hardie and CSR appear to have contributed around 3 billion dollars to the legacy asbestos bill, mostly in the form of personal injury compensation. These companies have so far avoided paying for most of the other societal impacts, but this fact is poorly acknowledged in academic or other material. We expect the final societal burden of legacy asbestos will reach a minimum of tens of billions of dollars and may extend to hundreds of billions.**

**More importantly, the steps taken by James Hardie and CSR to prevent continuing fatalities linked to, or resulting from, harmful exposure to legacy asbestos in homes have been minimal, with apparent reliance on a single website.**

## **Who Is Bearing the Costs of Legacy Asbestos in Australia?**

**The concessions made in the AICF were highly material and forestall or make difficult attempts by the NSW Government to obtain compensation from James Hardie**

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[the Amended and Restated Final Funding Agreement], adverse action could be directed against us by one or more of the NSW Government the government of the Commonwealth of Australia, governments of the other states or territories of Australia or any other governments, unions, or union representative groups, or asbestos disease groups, with respect to the liabilities of the Former James Hardie Companies ...'. Underlining added by author for emphasis.

Further, pg 163 notes that there is a risk that over the term of the AFFA [the Amended and Restated Final Funding Agreement], as has already occurred, some or all parties may become involved in disputes as to the interpretation of such legislation, the AFFA or related agreements or the terms of the AFFA may change.' Underlining added by us for emphasis.

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beyond personal injury compensation.<sup>60</sup> This legal outcome left NSW policy makers (and possibly other state leaders) holding an onerous pot of asbestos-related burdens and excruciating decisions about when and how to manage these.

When the States introduced Workplace Health and Safety obligations in 2011, large portions of the responsibilities, liabilities, and costs associated with asbestos management and removal were effectively transferred to private employers. Although the public sector retains some of these burdens, the numbers of commercially owned properties and private sector employees to which the state-based regulations apply exceed those managed by the public sector.<sup>61</sup>

The politics underpinning the passing of the workplace health and safety laws that shifted the burdens of managing legacy asbestos firstly, from James Hardie and CSR to the States and Territories, and then subsequently, in part to the commercial and employment sectors, are important and intriguing.

Our primary focus as a charity is to minimise loss of life from future harmful exposure to asbestos. One can argue that the legislated workplace health and safety obligations around legacy asbestos assist to achieve these objectives, and are, on balance, justifiable. At the same time, these legal developments provide possible motivations for State and Territory leaders to publicly suppress, understate or ignore information that discusses the scale of the redirected risks, liabilities, and costs to commercial and private workplace settings.

The laws with respect to the residential sector are incomplete and rarely discussed in public forums. Homeowners are responsible under existing law for the control of legacy asbestos in their properties other than in workplace settings. Further, despite claims to the contrary, all costs to identify, manage and or remove asbestos in

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<sup>60</sup> See Killer Company 290. Peacock suggests James Hardie might have the last laugh because it won legislative immunity against claims that was not given to other producers.

<sup>61</sup> Total employees in Australia in May 2020 were around 13 million, including 2 million in the public sector: (Employment and Earnings, Public Sector, Australia June 2020) released 12 November 2020; (Labour Force, Australia, May 2021) released 17 June 2021.

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residential properties (and or any consequential reductions in the value of the property) are borne by homeowners, and facing these charges and other adverse effects is inevitable.<sup>62</sup> The only question today is whether these costs and impacts are borne by the present or future owners.

As reflected in the household surveys facilitated by Digital Finance Analytics:

- Most householders (including homeowners) are not properly aware of the dangers and impacts of legacy asbestos and are not aware of their associated legal responsibilities.
- Most are not proactively identifying or managing legacy asbestos in their properties.
- Most are not seeking advice from licensed asbestos professionals.
- Many therefore remain at risk of deadly exposure.

Notably, the large-scale capital costs to remediate and remove legacy asbestos from properties across Australia cannot be avoided indefinitely, regardless of whether inbuilt asbestos is removed by means of systematic eradication plans or is left to be removed as buildings are renovated, demolished, or deteriorate. That is, *in situ* asbestos will have to be removed from properties at some point; the only uncertainties are when this will occur, under what conditions, who will pay, and how many people will suffer or die in the meantime.

## Our Summary & Views

Asbestos is a prime example of the capacity of corporations to make decisions that prioritise short-term profit gains while dismissing or discounting the future adverse effects on employees, customers, and the broader community.<sup>63</sup>

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<sup>62</sup> We are not aware of existing federal or state-based programs that subsidise these costs.

<sup>63</sup> See, eg, 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.

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**James Hardie, CSR and Wunderlich Ltd continued to mine and mass produce products containing asbestos in Australia for many decades, despite repeated health warnings, compelling medical evidence, mounting death counts, and without adequately warning their employees, customers and the public about the dire risks associated with their products. The underlying cost benefit analyses done by the relevant company directors and executives seemingly:**

- **Ignored the value of human life and the longer-term consequences, and or**
- **Calculated that the benefits would still exceed the costs, and or**
- **Assumed that the future costs could be transferred to external parties.**

**Indeed, asbestos is a classic case study of the ability of companies to shift most of the longer-term costs of their activities to external parties. Based on the publicly available evidence reviewed, the cumulative levels of compensation and other contributions from James Hardie and CSR (until March 2020) to minimise deaths and mitigate harms caused by legacy asbestos totalled less than 3 billion dollars.**

**While this may seem a large number, the scale of corporate externalities associated with legacy asbestos is enormous and the ongoing bills are unrelenting. These societal burdens include, but are not limited to, the health and other costs of uncompensated victims, the costs of public health communications on asbestos risks and impacts, the costs to identify and remediate or remove asbestos-containing materials from government, commercial and residential properties and infrastructure, the costs to remediate contaminated industrial sites, and the costs of disposing of hazardous waste.**

**We predict that these combined financial impositions will eventually well exceed tens of billions of dollars and that most of these costs will be paid by taxpayers, businesses, homeowners, and uncompensated victims.**

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## 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 enhance public awareness and knowledge of the dangers of asbestos threats.**
- **To promote measures and policies that prevent or minimise the harms from asbestos-related diseases.**

**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.**