

ANNEXURE H

Counsel Assisting's Issues Paper

SPECIAL COMMISSION OF INQUIRY INTO THE MEDICAL RESEARCH COMPENSATION FOUNDATION

List of Issues

This is an issues paper prepared by Counsel assisting the Commission pursuant to direction of the Commission. It states issues rather than conclusions. It is not intended to preclude parties who have been given authority to appear from raising in their submissions other issues within the scope of the Commission's terms of reference.

Glossary

Allens	Allen Allen & Hemsley, then Allens Arthur Robinson
Amaba	Amaba Pty Ltd, known as Jsekarb Pty Ltd
Amaca	Amaca Pty Ltd, to February 2001 known as James Hardie & Coy Pty Ltd
Coy	James Hardie & Coy Pty Ltd to February 2001
Current Data	James Hardie's asbestos claims data for the period 1 April 2000 to 31 December 2000
DOCI	Deed of Covenant and Indemnity dated 15 February 2001 between JHIL, Coy and Jsekarb (Ex 1, vol. 6, tab 60)
DOCIA	Deed of Covenant, Indemnity and Access dated 31 March 2003 between JHINV and ABN60 (Ex 122, PGM2, vol 1, tab 49)
February Report	The Trowbridge letter report dated 13 February 2001
JHA	James Hardie Australia Pty Ltd
JHFC	James Hardie Fibre Cement Pty Limited
JHIL	James Hardie Industries Limited to October 2001, thereafter ABN 60 Limited
JHINV	James Hardie Industries NV (formerly RCI Netherland Holdings BV)
JHNV	James Hardie NV

JHR	James Hardie Research Pty Ltd
Jsekarb	Jsekarb Pty Ltd to February 2001, thereafter Amaba Pty Ltd
KPMG	KPMG Actuaries Pty Ltd
MRCF	Medical Research & Compensation Foundation
Trowbridge	Trowbridge Consulting Ltd, later Trowbridge Deloitte Ltd.

A. THE CURRENT POSITION OF THE MRCF

1. Actuarial firms Trowbridge and KPMG have given different estimates of the present and future liabilities of Amaca and Amaba as at 30 June 2003. Those estimates are differentiated by the following elements:

- i) number of future reported claims;
- ii) claim costs;
- iii) nil settlement rate;
- iv) superimposed inflation.

The last is the major source of variance (\$356.5m out of \$483.6m – see Wilkinson, Ex 252, pg ix).

- a) In relation to superimposed inflation, the evidence suggests that an appropriate rate may be either 4%, 6% reducing to 2%, or 2%. Which is appropriate? What impact would the choice of rate have on the estimate of liabilities (for example, adoption of 4% would increase Trowbridge's estimate from \$1,089.8 million to \$1,866.1 million (Ex 3 vol 3 pgs 613, 653); adoption of 6% reducing to 2% would increase KPMG's estimate from \$1,573.4 million to \$1,958.1 million (Ex 252 pg 109))?
- b) What estimates should the Commission accept?
- c) What amount, or amounts, should be found to be the "future asbestos related liabilities" of Amaca and Amaba, for the purposes of Term of Reference 1? How is that amount to be arrived at?

2. To what extent is the escalation in Trowbridge's assessment of liability between the February Report and the present attributable to:

- (a) any change in claims administration or policy on the assumption of control by MRCF;

- (b) “judicial inflation” (ie, an increase in the size of awards for equivalent cases);
 - (c) unanticipated increases in costs;
 - (d) unanticipated increases in numbers of claims;
 - (e) other changed circumstances?
3. Does the MRCF have insurance recovery rights or rights of reimbursement that are not allowed for in the 2003 Trowbridge and KPMG reports? If so, what is their value, and what impact would they have on current estimates of the ability of Amaca and Amaba to satisfy their present and future liabilities? In particular:-
- (a) On what basis did Trowbridge assess the anticipated insurance recoveries for Amaca and Amaba? Why has the anticipated amount of insurance recoveries increased between Trowbridges’ February 2001 report and the 2003 report?
 - (b) As regards policies issued by insurers in the HII group, what is their number, face value and scope?
 - (c) To what extent may there be rights of recovery pursuant to the HII Claim Support Scheme in respect of those policies (see Ex 220-223)?
 - (d) To what extent does s.562A of the *Corporations Act* make available claims against re-insurers?
 - (e) Insofar as the policies are claims made policies in respect of previous periods of insurance, may claims be made now in reliance on s.54 of the *Insurance Contracts Act*?
 - (f) What were the results of the recent inquiries on behalf of MRCF in the London insurance market?
4. Some evidence suggests that an analysis directed at establishing a level of funding for Amaca and Amaba that might have a reasonable likelihood of

satisfying all legitimate claims would proceed in different fashion from the analyses undertaken by Trowbridge and KPMG.

(a) In particular, such an analysis might have to make conservative allowance for the following matters:

- i) number of future reported claims
- ii) claim costs
- iii) cashflows and discount rate
- iv) superimposed inflation
- v) excluded claims (see below)
- vi) propensity to sue.

Is this correct?

(b) If so, could these matters be catered for by including in the models already proposed by Trowbridge and KPMG:

- i) more conservative allowances (where assumption exists);
- ii) sensitivity analyses;
- iii) a buffer or contingency factor; and/or
- iv) an explicit estimate of the probability of the assessed net present value of claims?

B. THE FEBRUARY REPORT

(i) Omission of Current Data

5. The February Report was, at the request of JHIL, prepared without reference to the Current Data. Some evidence suggests that Messrs Minty and Marshall wished to have, and asked for, the Current Data for the purposes of preparing the February Report. Other evidence suggests that Mr Minty or Mr Marshall said that

the Current Data was not required, or would not make any difference to their report.

(a) What evidence as to the circumstances resulting in the non-inclusion of the Current Data in the February Report should be accepted?

(b) Would the Current Data have affected the estimates in the February Report, and if so, to what extent? In this regard, there is evidence that:

i) Trowbridge, with knowledge of the Current Data, would have increased its estimated 20 year NPV from \$286 million to \$373 million and the total (50 year) NPV from \$322 million to \$437 million (in each case, with no allowance for super-imposed inflation) (see Ex 50, pg 338; see however Wilkinson, Ex 252, pages 77-84);

ii) KPMG, with knowledge of the Current Data, would have increased its estimated NPV from \$694.2m to \$1044.5m (in each case, with super-imposed inflation at 2%) (Ex 252, pg. 86).

(c) To what extent, if at all, was JHIL influenced to ask Trowbridge to prepare the February Report by reference to the data as at 31 March 2000 by:-

i) a concern that this reference to the Current Data would unduly delay completion of the report;

ii) a belief that data after March 2000, or perhaps June 2000, was not “clean”?

6. There is evidence that the incoming MRCF directors did not appreciate that the February Report and the cash flow model produced by Mr Harman of JHIL did not employ the Current Data for the “best estimate” and “high” iterations of the model? If this is correct, should they on or before 15 February 2001 have appreciated this was the case, having regard to:-

i) the language and content of the February Report, including the language of the 15 February version of the report;

ii) the terms of the cash flow models they saw;

- iii) what the incoming MRCF directors were told by Trowbridge, JHIL representatives and their own lawyers;
- iv) documents seen by them; and
- v) any other circumstances?

(ii) Excluded Claims

7. The February Report does not appear to have:-

- (a) allowed for US litigation costs and settlements, remediation claims, exemplary and punitive damages, Dust Diseases Board reimbursement claims, and the risk of change in the medical or legal environment;
- (b) made full allowance for so-called “third wave” or “downstream” claims;
- (c) provided for further increases in propensity to sue.

To the extent that such matters were not allowed for:-

- (d) Having regard to the actual purpose for which the February Report was intended by JHIL to be used, and was in fact used, should allowance have been made for such matters?
- (e) Would allowance for such matters have made any difference of significance to an assessment in February 2001 of the liabilities of Coy and Jsekarb or the likely longevity of the MRCF?

(iii) Mesothelioma Experience

8. Evidence has been given that at the meeting on 19 January 2001, Mr Minty said words to the effect that James Hardies’ mesothelioma numbers had levelled off recently.

- (a) Was this an accurate statement of James Hardie’s mesothelioma claims experience as at January 2001?
- (b) If not:-

- i) Were the executives of JHIL who were present on 19 January 2001 aware of this?
- ii) Ought they have been so aware?
- iii) Did they at any time communicate an accurate statement of the current position to Trowbridge?
- iv) If not, why not?
- v) Was the omission deliberate?

(iv) Scope

9. The February Report only projected liabilities twenty years into the future; the present value of later claims was not assessed.

- (a) What significance, if any, was there in selecting a period of 20 years?
- (b) What importance, if any, was attributed to the new entity having an economic life of at least 20 years by
 - i) the incoming MRCF directors
 - ii) the outgoing directors of Coy and Jsekarb
 - iii) the board or management of JHIL?

10. Evidence suggests that the incoming MRCF directors asked for the June 2000 Trowbridge report, but that this was not provided to them. If this is correct:-

- (a) was it withheld because of a concern that its disclosure would highlight the limitations of and uncertainty surrounding the Trowbridge estimates, or the deterioration of the Trowbridge estimates from 1996 to 2000;
- (b) was it withheld out of a concern about legal professional privilege;
- (c) was it withheld for some other reason, and if so what;

- (d) if it had been disclosed to the incoming directors, would it have been likely to have made any difference to their decisions in relation to the establishment of the MRCF?

(v) "Best Estimate"

11. There is evidence that the Trowbridge "best estimate" or "most likely" estimate represented a median outcome, that is, the outcome in the range of possibilities such that 50% of possible outcomes would be higher and 50% would be lower. Is this correct? If so

(a) To what extent was this appreciated by:

- i) the incoming directors of the MRCF;
- ii) the board of JHIL;
- iii) the outgoing directors of Coy and Jsekarb;
- iv) Messrs Harman, Morley, Shafron or Macdonald?

(b) Insofar as it was not appreciated by those persons, would that knowledge have been likely to affect their decisions concerning the establishment of the MRCF?

(vi) Suitable for the Purpose?

12. Was the February Report suitable to be used for the purpose of estimating the likely longevity of the MRCF (whether by use of its assessed NPV of claims or by use of its undiscounted projections in the cash flow model) having regard to:-

- (a) the matters in paragraphs 4-11 above;
- (b) the purposes for which the February Report and its predecessors were prepared, as understood by Trowbridge;
- (c) the degree of uncertainty attached to the projections?

(vii) Use of the Trowbridge Report and cash flow model

13. Having regard to the evidence, including:

- (a) Mr Shafron's memo to Mr Macdonald, 11.10.00, Ex 189, p 3;
 - (b) the scope and limitations of the 2000 Trowbridge report, as disclosed by its terms and/or by the August 2000 Board Papers (Ex 148, vol 1, tab 1, pp 3-9, 12, 25, 28, 31);
 - (c) the February 2001 Project Green Board papers (Ex 80, tab 6, p 78-152);
 - (d) Mr R Williams's letter of 23 June 2000 (Ex 75, p 1784-7, PJS1, vol 5, tab 54);
 - (e) Mr Shafron's email to Mr R Williams of 8 March 2001 (Ex 209);
 - (f) that Trowbridge was not given the Current Data for the preparation of its February 2001 report;
 - (g) the information available to Mr Shafron and Mr Macdonald as to James Hardie's claims experience to 31 January 2001, and expected claims to 31 March 2001 (including Ex 150 p 196, Ex 148, vol 1, tab 5, p 88; tab 15 p 207, 208, 219, tab 18; Ex 57 vol 4 p 804ff; Ex 61 vol 5 tab 43, p 184, 185, 186, 187; Ex 75, vol 7 tab 109, 110);
 - (h) in the case of Mr Shafron, his knowledge that Mr Minty believed that James Hardie mesothelioma claims experience had levelled recently;
 - (i) further in the case of Mr Shafron, Ex 57 pg 144 (vol 1); Ex 61 vol 4 tab 33; Ex 61 vol 4 tab 49; Ex 61 vol 4 tab 50; Ex 65;
 - (j) James Hardie's estimates of the level of risks associated with areas of potential liability excluded from Trowbridge's analysis (Ex 57, vol 1, pgs 14-16);
 - (k) the meaning of a "best estimate" in a Trowbridge report;
- should it be concluded that Mr Shafron and/or Mr Macdonald:

- (l) did not exercise reasonable care in permitting the February Report to be used to assist the JHIL Board, the outgoing Coy and Jsekarb directors and the incoming MRCF directors to assess the likely longevity of the MRCF or what level of funding would be appropriate to found a reasonable likelihood that all claims, or all claims for a particular period, against Coy and Jsekarb would be met;
 - (m) believed that the February Report was not suitable for such use; or
 - (n) were indifferent to whether the February Report was suitable for such use?
14. Was the conduct of JHIL fraudulent in that Mr Shafron falsely represented to the incoming MRCF directors or the outgoing directors of Coy and Jsekarb that the February Report was suitable to be used for the purpose of assessing the likely longevity of the MRCF, intending them to use it for that purpose, when they did not believe that it was suitable for such use, or were recklessly indifferent to whether it was so suitable? If so, what are the consequences? Do Amaca, Amaba or the MRCF have valuable remedies as a result and if so, what is their basis (statutory or otherwise) and against whom would they be available? Is the DOCI liable to be set aside?
15. Did JHIL or Mr Shafron engage in conduct that amounted to negligent misrepresentation, or conduct that was misleading or deceptive or likely to mislead or deceive (“misleading or deceptive conduct”), by the use of the February Report and the cashflow model as regards the proposed directors of the MRCF or the outgoing directors of Coy and Jsekarb. If so what are the consequences — do Amaca, Amaba or the MRCF have valuable remedies as a result and if so, what is their basis (whether statutory or otherwise) and against whom are they available? Is the DOCI liable to be set aside, or varied to remove the covenant not to sue to the extent that it applies to claims other than asbestos claims?
16. Did Trowbridge, Mr Minty or Mr Marshall fail to exercise due care and skill in preparing the February Report in the respects identified by Mr Wilkinson in Ex 252, and thereby breach a duty of care owed to Amaca, Amaba, or JHIL? If so, what are the consequences, and what remedy, if any, would be available?

17. As at 15 February 2001, were Mr Minty or Mr Marshall aware that the incoming MRCF directors proposed to use the February Report in forming a view as to the likely longevity of the MRCF? If so, having regard to:

- (a) the answers in respect of issues 4-11 above;
- (b) the extent to which the terms of the February report disclosed the fact that it was not prepared by reference to up to date information;
- (c) the knowledge of Mr Minty and/or Mr Marshall as to whether the incoming directors had access to the June 2000 Trowbridge report;

did Trowbridge engage in conduct that amounted to negligent misrepresentation, or conduct in trade or commerce that was misleading or deceptive as regards the incoming directors, Coy or Jsekarb? If so, what are the consequences, and what remedy, if any, would be available?

C. THE CASHFLOW MODEL AND EARNINGS RATE ASSUMPTION

18. The evidence suggests that the future earnings rate assumed in the cash flow model developed by JHIL in connection with the separation proposal was, after the Trowbridge projections of costs, the most important assumption in the model. There is evidence that it was derived from the model, as a calculation of the rate necessary to keep assets in the MRCF subsidiaries until all the Trowbridge “most likely” projected claims were paid. It was then judged for reasonableness by reference to historical data, that is, after tax returns over 3 month to 15-year periods ending in 2000 for Australian pooled equity funds. The result was an assumed 11.7% earnings rate for the fund, before tax. Is this an accurate statement of what occurred?

19. Was the method adopted for deriving and assessing an assumed earnings rate for the fund reasonable, having regard to:-

- (a) the evidence of Dr Kingston as to historical earnings rates over longer periods;

- (b) the need suggested by Dr Kingston to allow for inflation (both past and as anticipated for the future);
 - (c) the warnings given in Ex 121, vol 7, pgs 2925, 2926 and in the UBS Warburg report of 19 February 2001 against using past returns to predict future returns;
 - (d) the historically high price/earnings ratios for Australian equities as at December 2000, as noted by Dr Kingston;
 - (e) the risk of volatility of investment returns, mentioned by both PWC and Access Economics, and highlighted by the much lower arithmetic average rates of return found by Tower Perrin for the 6 months and the year ending 31.12.00 (1.3% and 7.1% respectively);
 - (f) the fact that the funds surveyed by JHIL were not closed funds but rather funds open to new investment?
20. There is evidence that JHIL did not retain any expert to estimate *future* earnings rates for a fund of this kind (UBS Warburg having declined to do so). If this is correct, why were PWC and Access Economics not asked to review the earnings rate assumption?
21. There is evidence that the PWC and Access Economics reports were obtained in response to the suggestion of Mr Stephen Loosley that it was desirable that JHIL be able to say that two independent reviews had agreed with JHIL's calculations that in all probability there would be sufficient money for victims. If this is correct:
- (a) Why were PWC and Access constrained by their instructions not to examine or comment upon the assumptions in the model?
 - (b) Was the consequence that the PWC and Access reports were of little or no utility?
 - (c) Were the limitations of the PWC and Access Economics reports made known to the JHIL board, and if not, why not?

- (d) Was the import of the reports fairly represented by JHIL to the public and stakeholders in the period after the creation of the MRCF? If not, why not?
22. There is evidence to the effect that Mr Minty advised Mr Shafron that appropriate commercial (as opposed to risk free) rates of return for periods as long as the likely claims MRCF experience were rates between 7 and 9%. If this is correct:-
- (a) Why was this advice not adopted in the JHIL cash flow model?
- (b) Was Mr Minty's advice passed on to or otherwise known by:-
- i) Mr Morley;
 - ii) Mr Harman;
 - iii) Mr Macdonald;
 - iv) the JHIL Board?
- (c) If not, why not?
23. There is evidence that JHIL was advised in a draft report by Access Economics that an assumed earnings rate of 11.6% was "a high figure, especially over such a long period of time", a figure about which Access was "cautious" and which it believed JHIL "will need to test more fully" and that at the request of a JHIL executive this was deleted from the Access Economics advice. If this be correct:
- (a) Why was the request made?
- (b) Was the Access Economics advice acted on, and if not, why not?
- (c) Was the Access Economics advice passed on to the JHIL Board, and if not, why not?
24. There is evidence that the draft report by PWC urged the JHIL board **"to seek an independent review, or otherwise** satisfy themselves as to whether the values and assumptions used in the model are reasonable" and that at the request of a JHIL executive the emphasised words were deleted from the PWC advice. If this is correct:

- (a) Why was the request made?
 - (b) Was the advice acted on and if not, why not?
 - (c) Was the PWC advice passed on to Mr Morley or to the JHIL Board?
 - (d) If not, why not?
25. The Access Economics Report of 15 February 2001 noted the failure of the cash flow model to allow for volatility, and said, “a poor return in an early year can jeopardise the viability of the entire scheme over the forecast horizon.” The PWC report gave a similar warning.
- (a) Was anything done to investigate this issue or allow for it? If not, why not?
 - (b) How should it have been addressed?
 - (c) Were these observations passed on to the JHIL Board? If not, why not?
26. The PWC Report of 14 February 2001 mentioned additional limitations of the model. *First*, it contained no decision rules as to whether the level of funds at any time was prudent or necessary. *Secondly*, it did not systematically explore the risks inherent in the forecasts by recognising the risk adjusted time value of money.
- (a) Were these matters considered or dealt with by JHIL? If not, why not?
 - (b) How should they have been addressed?
 - (c) Were these observations passed on to the JHIL Board? If not, why not?
27. Having regard to the evidence, including:
- (a) Mr Morley’s oral evidence as to the utility of the PWC and Access Economics Reports;
 - (b) Mr Harman’s evidence as to the utility of his cashflow model, having regard to the comment of PWC and Access Economics;

- (c) the failure of James Hardie to obtain any independent expert opinion as to future earnings rates;
- (d) the matters raised in these issues as to the February Report;
- (e) the warnings expressed in Ex 121, vol 7, pgs 2925, 2926;
- (f) the fact that the funds surveyed in Ex 121, vol 7, tabs 120-122 (PGM1, pp 2922-2931) were not closed funds;
- (g) the limited purpose of the PWC and Access Economics reports, as compared to the recommendation of Mr Loosley recorded in Ex 145;

should it be concluded that JHIL and Mr Macdonald:

- (h) did not exercise reasonable care in permitting the cash flow model to be used to assist the JHIL Board, the outgoing Coy and Jsekarb directors and the incoming MRCF directors to assess the likely longevity of the MRCF or what level of funding would be appropriate to found a reasonable likelihood that all claims, or all claims for a particular period, against Coy and Jsekarb would be met;
- (i) did not believe the cash flow model to be suitable for use in assessing the likely longevity of the MRCF or what level of funding would be appropriate to found a reasonable likelihood that all claims, or all claims for a particular period, against Amaca and Amaba would be met; or were indifferent as to whether it was suitable for such use.

28. Was the conduct of JHIL fraudulent in that it falsely represented to the incoming MRCF directors or the outgoing directors of Coy and Jsekarb that the cash flow model was suitable to be used for the purpose of assessing the likely longevity of the MRCF, intending them to use it for that purpose, when it did not believe that it was suitable for such use, or was recklessly indifferent to whether it was so suitable? If so, what are the consequences? Do Amaca, Amaba or the MRCF have valuable causes of action as a result? Is the DOCI liable to be set aside?

29. Did JHIL or Mr Shafron engage in conduct that amounted to negligent misrepresentation, or conduct that was misleading or deceptive or likely to mislead or deceive (“misleading or deceptive conduct”), by the use of the February Report and the cashflow model as regards:

the proposed directors of the MRCF;

the outgoing directors of Coy and Jsekarb?

If so, what are the consequences – do Amaca, Amaba or the MRCF have valuable causes of action as a result? Is the DOCI liable to be set aside, or varied to remove the covenant not to sue to the extent that it applies to claims other than asbestos claims?

D. INDEPENDENCE and TIME PRESSURE

30. The evidence discloses that Sir Llew Edwards and Messrs Gill, Jollie, and Cooper were selected by JHIL to join the MRCF.

(a) To what extent, if any, were the incoming MRCF directors effectively independent of JHIL, having regard to the nature and extent of the prior dealings and relationships between Sir Llew, Mr Cooper, Mr Gill and JHIL?

(b) Did the incoming MRCF directors:

i) Properly and diligently assess the adequacy or otherwise of the funding associated with the establishment of the MRCF/Amaca/Amaba?

ii) Properly and diligently pursue JHIL for information which would assist them to assess the adequacy or otherwise of the funding associated with the establishment of the MRCF/Amaca/Amaba (eg, the June 2000 Trowbridge report; cash flows extending beyond 20 years; cash flows assuming a 7% earnings rate; evidence or opinion to support an assumed 11.7% earnings rate; advice as to how the warnings and criticisms of PWC and Access Economics as to the cash flow model were, or should be, addressed?

- iii) Pursue JHIL in an effective and timely way for remedies or assistance when it appeared there was likely to be a shortfall earlier than anticipated?
 - (c) What if any duties did the incoming MRCF directors have in these respects? What was the source and content any such duty?
 - (d) To what extent, if at all, does time pressure explain the acts or omissions of the incoming MRCF directors?
31. Was JHIL under any time constraints in early 2001 in relation to achieving separation of Coy and Jsekarb? Was the commencement of the accounting standard known as ED88 a relevant factor? If so, why? To what extent, if at all, do time pressure or perceptions of time pressure explain the acts or omissions of JHIL in respect of the separation process?

E. DEED OF COVENANT AND INDEMNITY OF FEBRUARY 2001

32. How was the consideration for the DOCI arrived at?
- (a) Should any additional factors have been taken into account by the outgoing directors of Coy and Jsekarb, in particular, the extent of any commercial and other advantages anticipated to be available to JHIL in the event separation were achieved in a timely way?
 - (b) What, on a proper assessment, was the value to JHIL of achieving separation from Coy and Jsekarb?
 - (c) If such matters were not taken into account by the outgoing directors of Coy and Jsekarb was this consistent with their duties of care and diligence (*Corporations Law* s180) and good faith (s181)?
 - (d) If not, what are the consequences? Are valuable remedies available to Amaca and Amaba? Is the DOCI liable to be set aside?
 - (e) Was JHIL a knowing participant in any such breach of duty? Was JHINV a knowing participant?

- (f) What remedies may be available against them?
33. The DOCI included a covenant by Coy and Jsekarb not to sue in respect of intercompany payments including dividends and management fees.
- (a) What advice did JHIL receive by 15 February 2001 as to the possible merits of such claims?
- (b) Was such advice passed on to the directors of Coy and Jsekarb (Mr Morley and Mr D Cameron). If not, why not?
- (c) Did JHIL elect not to obtain detailed advice as to this matter, and if so why?
- (d) There is evidence that information as to possible claims of these kinds was not given to the independent lawyers for Mr Morley, Mr D Cameron, and the incoming directors. If this is correct, why was this so?
34. Mr Morley says he relied on Allens to advise Coy and Jsekarb in relation to such matters, being those referred to in paragraphs 32 and 33 above.
- (a) Did he in fact rely on Allens to advise Coy and Jsekarb?
- (b) Were Allens in fact retained to do so?
- (c) If not, were the interests of those companies not addressed by any informed legal advice as to the DOCI?
- (d) Did Mr Morley or Mr Shafron appreciate that, in the circumstances, the interests of Coy and Jsekarb might not be protected?
- (e) If not, should they have appreciated this? Was this a breach of duty on the part of the directors of Coy and Jsekarb? Was JHIL or JHINV a participant in any such breach?
35. Were the directors of Coy and Jsekarb, given the financial circumstances of those two companies, obliged to exercise reasonable care and diligence to achieve higher consideration for the DOCI than that offered by JHIL? Does this depend on them having formed a view as to the likelihood of Amaca and Amaba being able to pay all their present and future creditors with the offered funds? If so:

- (a) Did the directors of Coy and Jsekarb form a view on that subject? If so, insofar as that view was based on Trowbridge's estimates of present and future liabilities, was the view reasonable having regard to what the directors knew or ought to have known concerning the Trowbridge estimates and their limitations?
 - (b) Insofar as the directors relied on the cash flow model in forming such a view, was the view reasonable having regard to what the directors knew or ought to have known concerning the model and its limitations?
36. What was the actual or potential liability of JHIL for asbestos related claims as at the date of separation?
37. The DOCI would not protect JHIL against claims by third parties if Coy and Jsekarb were no longer in a position to indemnify it. Was the put option, which obliged Coy to acquire all the shares in JHIL for a nominal consideration of ten dollars, included in the DOCI in order to cater for that situation?
38. As at 15 February 2001 were JHIL, Mr Shafron or Mr Macdonald directors of Coy and Jsekarb for the purposes of the *Corporations Law*?

F. SEPARATION AND PUBLIC RELATIONS

39. There is evidence that JHIL regarded the possibility of adverse public and government reaction as a major risk in relation to achieving successful separation from Coy & Jsekarb, and devoted particular attention to its public relations strategy in respect of separation, in order to maximise the chances of its success. Is this correct?
40. In the period commencing 16 February 2001 JHIL and its executives appear to have published statements to the effect that:-
- (a) the MRCF was "fully funded" and would be able to meet all legitimate claims (with (b), (c) and (d) below, published to the ASX on 16/2/01 – Ex 1, vol 7, tab 66);
 - (b) (by implication) there was a reasonable basis for such claims;

- (c) in establishing the MRCF JHIL had sought or relied on expert advice from PWC and Access Economics in respect of the level of funding for the MRCF;
- (d) the establishment of the MRCF would provide certainty for claimants;
- (e) its belief that all claims would be met was on
 - i) “the best available information”
 - ii) “a reasonable rate of return on the funds invested”
 - iii) “detailed expert and independent advice” from firms including PWC and Access Economics (see Ex 61, vol 6, Tab 21)

Is this correct?

41. The separation of JHIL from Coy and Jsekarb in February 2001 did not attract a hostile government reaction. To what extent might this have been due to:

- (a) the publication of statements of the kind set out above;
- (b) JHIL’s refusal to make the February Report, the PWC and Access Economics reports or the cash flow model public?

42. In light of the matters raised above, were JHIL’s public disclosures concerning separation misleading or deceptive? If so:-

- (a) Did JHIL or Mr Macdonald contravene s995(2) of the *Corporations Law*?
- (b) Did JHIL or Mr Macdonald contravene s999 of the *Corporations Law*?
- (c) Did Mr Macdonald commit an offence against s 1309(1) of the *Corporations Law* by permitting the furnishing of Ex 1, vol 7, tab 66 to the ASX, containing the information referred to above, which information was false or misleading in a material particular, namely, that the MRCF was not fully funded and would not be able to pay all legitimate claims and there was no reasonable basis for such claims, and further, which information omitted from it matter the omission of which rendered the information misleading in a material respect, namely, in that it omitted to state the limitations of the

material on which the statements were based, (referred to more fully in earlier issues)?

- (d) Did Mr Macdonald commit an offence against s1309(2) of the *Corporations Law* by engaging in the conduct referred to in the last paragraph without having taken reasonable steps to ensure that the information was not false or misleading in a material particular and did not omit from it matter the omission of which rendered the information misleading in a material respect.
- (e) Was any other officer of JHIL knowingly concerned in or a party to any contravention of the kind referred to in (b), (c) or (d)?
- (f) If any of these issues is answered in the affirmative, what are the consequences?

G. EFFECT OF SEPARATION – GENERAL

43. Did the circumstances in which Coy and Jsekarb were separated from the James Hardie Group

- (a) result in, or
- (b) contribute to

a possible insufficiency of assets of either of those companies to meet its future asbestos related liabilities? If so, in what respect and to what extent were the assets of those companies affected?

H. THE 2001 RESTRUCTURE

44. In the period April to October 2001, what were the plans or intentions of JHIL as to:

- (a) separating JHIL from the James Hardie group after the restructure;
- (b) the possible cancellation of the partly paid shares intended to be issued by JHIL to JHINV as part of the restructure;
- (c) the possible exercise of the put option in the DOCI?

45. Having regard to:

- JHIL's plans or intentions, such as they were;
- the relevance of them to JHIL's obligation to provide information in the 2001 Information Memorandum ("IM"); and
- The relevance of them to the question whether the partly paid shares were an effective assurance that any creditors of JHIL would not be prejudiced by the restructure (and in particular, the reduction of JHIL's capital):

(a) Was it a breach of JHIL's obligations under the Corporations Regulations not to refer to those plans or intentions in the Information Memorandum – Ex 1 vol 8, pp2373-2552 ("IM");

(b) Was the IM misleading or deceptive for failing to refer to those plans or intentions;

(c) Was it a breach of JHIL's duty of disclosure to the Supreme Court to fail to draw to its attention:

- i) those plans or intentions;
- ii) the existence of the put option in the DOCI;
- iii) the matters raised in Sir Llew Edwards' letter to Mr Macdonald of 24 September 2001;
- iv) the matters raised by Mr Cooper on 19 April 2001 (Ex 150 pg.156), 26 June 2001 (Ex 150 p.163), 7 August 2001 (Ex 150 p.167);

while telling the court that "under the terms of the issue of the partly paid shares JHIL will be able to call upon JHINV to pay any or all of the remainder of the issue price...at any time in the future and from time to time" (Ex 61, vol 6 pg 120, pg 126) and with specific reference to asbestos liabilities, that "JHIL will have through existing reserves and access to funding in the form of the partly paid shares, the means to meet liabilities which *may arise in the future*" (emphasis added – Ex 61, vol6, pg 139)?

- (d) If the answer to (a), (b) or (c) is affirmative, what consequences follows?
- (e) If the answer to (a), (b) or (c) is affirmative, did Allens breach a duty of care owed by it to JHIL? If so, did JHIL suffer any compensable loss as a consequence?

I. CANCELLATION OF THE PARTLY PAID SHARES

46. On 15 March 2003, ABN 60, by resolution of its directors Mr Salter and Mr Morley, acting pursuant to s.256B of the *Corporations Act*, cancelled the partly paid shares which had been issued to JHINV as part of the 2001 Restructure (see Ex 122, PGM2, vol 1, p.130).

- (a) Did the cancellation of the shares materially prejudice ABN60's ability to pay its creditors within the meaning of s.256B(1)(b)? In this regard, were Amaca and Amaba "creditors" as regard potential claims of the kind referred to in issues 5-38 above?
- (b) Was JHINV a director of ABN 60 as at 15 March 2003, within the meaning of s9 of the *Corporations Act*?
- (c) Did the directors of ABN60 act consistently with their duties of care and diligence (s.180(1) *Corporations Act* 2001 (Cth)) and good faith (s.181(1)) in resolving to cancel the shares, having regard to
 - i) the terms of the legal advice they received as directors;
 - ii) the terms of any other legal advice of which they were aware as executives of JHINV;
 - iii) the matters raised by representatives of the MRCF and referred to in the immediately preceding paragraph;
 - iv) Mr Morley's knowledge of the circumstances surrounding the separation of Amaba and Amaca from ABN 60;
 - v) any other relevant matters?

- (d) If the answer to (a) is negative
- i) Did ABN60 contravene s.256D(1) of the *Corporations Act*?
 - ii) If so, were any persons involved in the contravention within the meaning of s79 of the *Corporations Act*?
 - iii) If yes to (i) or (ii), what are the consequences? Are there valuable remedies available to ABN60, its creditors or any liquidator of ABN60? If so, what is their basis (whether statutory or otherwise), and against whom are they available?
- (e) If the answer to (c) is negative, what are the consequences? Are valuable remedies available to ABN60, its creditors or any liquidator of ABN60? If so, what is their basis (whether statutory or otherwise), and against whom are they available?
47. Was s.256B properly available to be used by JHIL in circumstances where statements of the nature referred to above had been made to the Supreme Court in connection with the creation of the partly paid shares.

J. RECTIFICATION OF THE DOCIA

48. By a deed dated 3 February 2004 between ABN60 and JHINV (Ex 42, Tab 39) the terms of the DOCIA were varied.
- (a) What were the effects of the variation as regards the rights and obligations of ABN60 and its present and former directors?
 - (b) Was an effect of the variation to deprive ABN60 of the right pursuant to clause 5.1 of the DOCIA to be indemnified by JHINV in respect of claims, which might be made against ABN60 by MRCF, Amaca or Amaba in relation to:
 - i) the separation of Amaca (Coy) and Amaba (Jsekarb) from ABN60 (JHIL);
 - ii) the creation of the MRCF;

- iii) the execution of the DOCI in February 2001;
- iv) transactions between Coy, Jsekarb and JHIL (or other companies in the James Hardie Group) prior to 16 February 2001, including payment of dividends and management fees;
- v) the cancellation of the partly paid shares?

(c) If the answer to the last issue is affirmative:

- i) Was the execution of the deed of rectification in the interests of ABN60, having regard to any benefits derived by it under the deed and the prospect of those benefits being achieved without reducing the scope of the indemnity available to it under the existing terms of the DOCIA;
- ii) Did the directors of ABN60 (Mr D. Cameron and Mr Macphillamy) act consistently with their duties of diligence (s.180(1)) and good faith (s.181) in causing the deed of variation to be executed?
- iii) If not, what are the consequences? Does ABN60 have any valuable causes of action against them?

49. Having regard to the answers in respect of the last issue, did Corrs Chambers Westgarth breach any duty of care to ABN60 in advising its directors in respect of the deed of rectification? If so, did the breach cause ABN60 any compensable loss?

K. 1995-1998 TRANSACTIONS

Minimisation of assets held by Coy

- 50. There is evidence, which suggests that by some time in 1994 or 1995 there was a policy, at least within some levels of management of the James Hardie Group, of minimising Coy's assets with a view to reducing the extent to which assets of the James Hardie group might be available to asbestos claimants. Should a finding be made to this effect?
- 51. There is also evidence which suggests that one of the purposes of Project Chelsea was to isolate the business of Coy and the assets used in that business from Coy's liabilities to asbestos plaintiffs ("the...structure has been designed to insulate [JHNV] from such claims" – Ex 91, pg 5), with a view to ensuring that assets of the James Hardie group which were thought to be of

value to its continuing operations were not available to asbestos claimants.
Should a finding be made to this effect?

Transfer of Coy's core technology to JHR in 1995

52. The evidence suggests that the transfer of Coy's core technology to JHR:
- (a) was for fair value;
 - (b) was made for legitimate commercial purposes;
 - (c) was approved by the directors of Coy consistently with their directors' duties.

Should a finding be made to this effect?

Dividends paid by Coy

Dividend of \$60 million, 14 August 1995 and dividend of \$40.9 million, 24 August 1995 ("August 1995 dividends")

53. As for Coy's financial position:
- (a) By 5 June 1996 Trowbridge had, on a preliminary basis, assessed JHIL's present and future asbestos liabilities, as at 31 March 1996, as being approximately \$175 million (Ex 2, v 3, p 559).
 - (b) On 3 September 1996 Trowbridge produced a presentation intended for the board of Coy with an assessment of James Hardies' present and future asbestos liabilities, as at 31 March 1996, at approximately \$193 million (Ex 178, a document produced to the Commission by James Hardie — JHI.0002.002-004).
 - (c) In October 1996 Trowbridge produced a report assessing James Hardies' present and future asbestos liabilities, as at 31 March 1996, as being approximately \$230 million (Ex 2, v 3, p 585).
 - (d) Would it be appropriate to infer that if Trowbridge had performed an assessment of Coy's present and future asbestos liabilities, as at August 1995, it is likely that it would have assessed those liabilities as being somewhere in the range of \$175-\$230 million.
 - (e) Would it be appropriate to infer that if, in conducting any of the assessments of Coy's present and future asbestos liabilities identified in paragraphs (a)-(d) above, Trowbridge had made appropriate allowance for superimposed inflation, and the need for a better than 50/50 chance of being able to fund all claims, the assessment as at 31 March 1996 would have been in the order of \$530 million (see Ex 2, v 3, p 636 — high claim numbers plus high claim inflation).
 - (f) Coy's present and future asbestos liabilities, as at 14 August 1995, may now be seen, with the benefit of hindsight, to have been in excess of \$1 billion.
 - (g) According to Coy's financial statements for the year ended 31 March 1996 ("YEM 1996"), its net assets were approximately \$100.9 million. Allowing for the dividends paid that year and the profit realised on assets sold in 1998, would it be appropriate to infer that

immediately prior to the declaration of dividend on 14 August 1995 Coy's net assets were roughly as follows:

- i) book value as at 31 March 1996 - \$100,925,000
 - ii) add back August 1995 dividends - \$100,900,000
 - iii) add profit on sale of trade marks (\$116,500,000), plant and equipment (\$12,532,919) and sale of business (\$16,500,000) (see Morley, Ex 121 paras 34, 64 and 80)
 - iv) total - \$347,357,919?
- (h) In the year ended 31 March 1996, Coy:
- i) earned net operating profit of \$11.7 million; and
 - ii) paid dividends of \$100.9 million.
- (i) In the year ended 31 March 1997, Coy:
- i) suffered a net loss after abnormals of \$33.6 million; and
 - ii) paid a dividend of \$43.5 million.
- (j) Is it correct that neither Coy nor JHIL obtained an actuarial assessment of their asbestos liabilities prior to June 1996?

54. Having regard to the matters set out in the last paragraph:

- (a) Was it a breach of their duties by the directors of Coy, to act with care and diligence, and to exercise their powers in good faith in the best interests of the corporation (see sub-sections 232 (2) and (4) of the *Corporations Law*) to resolve to pay the August 1995 dividends without any actuarial assessment of Coy's present and future asbestos liabilities made for the purpose of ascertaining the level of assests that it was necessary or appropriate for Coy to have in order to be reasonably confident of being able to pay all potential future creditors?
- (b) If the directors of Coy had commissioned and reviewed such an actuarial assessment would they have resolved to pay the August 1995 dividends?
- (c) If the directors of Coy had known the true extent of Coy's present and future asbestos liabilities as at August 1995 could they have resolved to pay the August 1995 dividends consistently with their duties as directors?
- (d) Were the August 1995 dividends paid under a mistake, and if so were they recoverable on that ground?
- (e) Was JHIL a director of Coy in August 1995 within the meaning of s9 of the *Corporations Law*?
- (f) Having regard to the answers to the preceding issues, as at 13 February 2001 did Coy have available to it a valuable cause of action in respect of the August 1995 dividends against Dr Barton, Mr McFadden, Mr Ghantous or JHIL? If so, are such claims now statute barred? If so, would the fact of such a bar be damage attributable to

any misconduct of JHIL or any other person in respect of the separation events?

L. Interim dividend of \$43.5 million, 2 October 1996 (“October 1996 dividend”)

55. As for Coy’s further financial position:

- (a) As at September 1996, Coy’s profit and loss account showed an operating profit before income tax of around \$9.2 million and after tax of around \$4 million.
- (b) Is it reasonable to infer that the August 1996 management accounts for Coy would have been likely to show a similar operating profit before and after income tax?
- (c) Would the directors of Coy have had at least the August 1996 management accounts available to them when they declared the October 1996 dividend?
- (d) Coy’s profit and loss account for the year ended 31 March 1997 showed:
 - i) an operating loss before income tax of around \$50.4 million and after income tax of around \$33.6 million;
 - ii) retained profits at the beginning of the financial year of around \$65,834,000; and
 - iii) total profits available for appropriation at the end of the financial year of around \$32.2 million.

56. Having regard to the matters set out in the previous paragraph:

- (a) *As at 2 October 1996, could the directors of Coy have held a genuine opinion that profits out of which the October 1996 dividend could be paid existed?*
- (b) Was the October 1996 dividend paid other than from profits in contravention of section 201 of the *Corporations Law*?
- (c) As at 2 October 1996 was JHIL a director of Coy for the purposes of the *Corporations Law*?
- (d) Did the directors of Coy breach their duties, under section 232 of the *Corporations Law*, to act with care and diligence, and to exercise their powers in good faith in the best interests of the corporation, in resolving that Coy pay the October 1996 dividend?
- (e) If the directors of Coy resolved to pay the October 1996 dividend without first reviewing the October 1996 Trowbridge report, was this a breach of their directors’ duties?
- (f) If the directors of Coy had first reviewed the October 1996 Trowbridge report, or had notice of its contents, could they have

resolved to pay the October 1996 dividend consistently with their duties as directors?

- (g) Alternatively, was it a breach of their duties for the Coy directors to resolve to pay the October 1996 dividend without an actuarial assessment of Coy's present and future asbestos liabilities made for the purpose of ascertaining the level of assets that was necessary or appropriate for Coy to have in order to be reasonably confident of being able to pay all future creditors?
- (h) If the directors of Coy had commissioned and reviewed such an actuarial assessment would they have resolved to pay the October 1996 dividend consistently with their duties as directors?
- (i) If the directors of Coy had known the true extent of Coy's present and future asbestos liabilities as at 2 October 1996 could they have resolved to pay the October 1996 dividend consistently with their duties as directors?
- (j) Was the October 1996 dividend paid under a mistake, and if so was it recoverable on that ground?
- (k) Having regard to the answers to the preceding issues, as at 13 February 2001 did Coy have available to it a valuable cause of action in respect of the October 1996 dividends against Dr Barton, Mr McFadden, Mr Ghantous and JHIL? If so, are such claims now statute barred? If so, would the fact of such a bar be damage attributable to any misconduct of JHIL or any other person in respect of the separation events?

Management fees

57. As for Coy's payment of management fees:

- (a) The management fees paid by Coy to JHIL between 1990 and 1998 (inclusive) were, according to Coy's accounts, \$19.5 million (1990), \$19.5 million (1991), \$19.5 million (1992), \$21.5 million (1993), \$20.3 million (1994), \$20.3 million (1995), \$21.5 million (1996), \$25.9 million (1997) and \$15.6 million (1998).
- (b) The net assets of Coy as disclosed in its financial statements between 1990 and 1998 (inclusive) were \$76.1 million (1990), \$77.8 million (1991), \$58.1 million (1992), \$58.9 million (1993), \$63.8 million (1994), \$86.1 million (1995), \$100.9 million (1996), \$20.7 million (1997) and \$47 million (1998).
- (c) With the benefit of hindsight, at all times from at least 1990 onwards, Coy's present and future asbestos liabilities were in excess of \$1 billion.
- (d) On what basis were the management fees calculated in this period? What factors were taken into account in deciding the extent to which particular subsidiaries of JHIL should bear the proportion of JHIL corporate costs attributed to them?
- (e) Is it right that the management fees paid by Coy to JHIL were calculated on the basis that only Australian companies in the James

Hardie Group would contribute to Group overheads? If so, did this result in a fair attribution of corporate costs to Coy?

- (f) Were the management fees fair payment for the services rendered to Coy by JHIL?
58. Having regard to the extent of Coy's future asbestos liabilities, and the matters in the previous paragraph:-
- (a) Was it a breach of the Coy directors' duties, under section 232 of the *Corporations Law*, to act with care and diligence and to exercise their powers in good faith in the best interests of the corporation, to authorise payment of the management fees to JHIL from at least the financial year ending 31 March 1995 (if not earlier) without:
 - (i) an actuarial assessment of Coy's present and future asbestos liabilities made for the purpose of ascertaining the level of assets necessary or appropriate for Coy to have available in order to be reasonably confident of being able to pay all future creditors; or
 - (ii) an assessment of a fair arms length price for the value of the services rendered by JHIL to Coy?
 - (b) If the directors of Coy had commissioned and reviewed such an actuarial assessment would they have resolved to pay the management fees or all of them to JHIL?
 - (c) If the directors of Coy had known the true extent of Coy's present and future asbestos liabilities could they have resolved to pay the management fees or all of them to JHIL consistently with their duties as directors?
 - (d) If the directors of Coy authorised payment of the management fees to JHIL for 1997 and 1998 without first reviewing the October 1996 Trowbridge report, were they in breach of their directors' duties?
 - (e) If they had first reviewed the October 1996 Trowbridge report, could the directors of Coy have authorised payment of the management fees, or all of them, to JHIL for 1997 and 1998 consistently with their duties as directors?
 - (f) Was JHIL a director of Coy for the purposes of the *Corporations Law* between 1995 and 1998 (inclusive)?
 - (g) Are any remedies available to Coy in respect of these matters? If so, what is their basis (statutory or otherwise) and against whom are they available?

Transfer of Coy's plant and equipment to JHFC on 31 March 1998

- 59. The evidence indicates that the transfer of Coy's plant and equipment to JHFC was for fair value. Is this correct?
- 60. There is evidence, which suggests that the transfer may have been, in whole or in part, for the purpose of preventing those assets being available to asbestos plaintiffs. Is this correct? Are any remedies available to Coy in

respect of these matters? If so, what is their basis (statutory or otherwise) and against whom are they available?

Transfer of Coy's trade marks to JHR on 30 June 1998

61. The evidence suggests that the transfer of Coy's trade marks to JHR was for fair value. Should the Commission make a finding to this effect?
62. What were the purposes of the transfer of Coy's trade marks to JHR? Was it a purpose of the transfer to isolate Coy's trade marks from its liabilities to asbestos plaintiffs, with a view to preventing those assets being available to such plaintiffs? Are any remedies available to Coy in respect of these matters? If so, what is their basis (statutory or otherwise) and against whom are they available?

Transfer of Coy's core business to JHA on 28 October 1998

63. *Grant Samuel valuation of business report dated 1 October 1998 ("GS Report")*

In respect of the GS Report

- (a) Was the EBITDA forecast for 1999 ("1999 forecast") used in the GS Report appropriate?
 - (b) How did the 1999 forecast compare with the actual EBITDA of Coy's core business for 1999?
 - (c) Should the 1999 forecast have been increased to allow for a reduction in costs associated with Coy's properties (and, in particular, land tax) as a consequence of those properties not being sold with the business and if so with what consequences?
 - (d) Was the capitalisation multiple used in the GS Report appropriate?
 - (e) What are the reasons for the difference in the value of Coy's goodwill as assessed by PricewaterhouseCoopers in its draft business valuation report dated 31 March 1998¹ and its goodwill and trade marks valuation report dated 19 April 1999 and as assessed in the GS Report?
64. Having regard to these considerations, is there a basis for concluding that the fair value of the goodwill of Coy's business as at 1 October 1998 exceeded the amount paid for it upon the sale of the business to subsidiaries of JHNV?
 65. Would Coy have been able to fund a greater proportion of its liabilities to creditors, including asbestos plaintiffs, if its trademarks and core business had not been transferred? If so, would it be correct to conclude that even if the transfer of Coy's trade marks and core business was for fair value, those

¹ Produced to the Commission by PWC on 7 June 2004. It is anticipated this document will be tendered on 2 August 2004, if not before.

transactions reduced the assets available to creditors of Coy? Was such an outcome expected or thought likely to be the case by the directors of Coy when the transfer occurred?

66. In the circumstances, did the directors of Coy breach their duties, under section 232 of the *Corporations Law*, to act with care and diligence, and to exercise their powers in good faith in the best interests of the corporation in approving the transfer of the trademarks and core business? If so, does Coy have any valuable remedies available to it? If so, what is their basis (statutory or otherwise) and against whom are they available?
67. Was JHIL a director of Coy for the purposes of the *Corporations Law* in the year ending 31 March 1999?

Leases and rental valuations

68. The evidence suggests that at the time JHIL was instructing JLW Advisory to assess a fair rental as between Coy and JHA for JHA's occupation of each of the Carole Park, Welshpool, and Rosehill properties, JHIL intended that JHA would lease the properties for 10 years and was aware that JHA would otherwise have to relocate substantial business operations. Is this correct?
69. If this was the use to which it was intended the properties would be put, was it appropriate for JHIL to adopt rentals for the leases which were set by reference to rental opinions which:
 - (a) assumed that the properties were vacant;
 - (b) proceeded on the basis that some of the properties were too large to be let to a single tenant;
 - (c) proceeded on the basis that some properties or parts of properties would not be leased for a ten-year term?
70. JHIL adopted the net effective rentals calculated by JLW on the assumptions set out above in the leases of the properties. In the circumstances, were the resulting rentals fair market rentals as between Coy and JHA?
71. Did the directors of Coy breach their duties, under section 232 of the *Corporations Law*, to act with care and diligence, and to exercise their powers in good faith in the best interests of the corporation, in authorising Coy's entry into the leases with JHA having regard to the basis on which the rental was calculated? If so, did Coy suffer any loss as a result, when regard is had to the basis on which the goodwill of its business was assessed for the purpose of the core business transfer?

Voidable transactions

72. Is there any basis for concluding that any of the 1995-1998 transactions is a transaction that might be voidable or the subject of some other remedy were a liquidator appointed to Coy, or voidable under s37A of the *Conveyancing Act* 1919 (NSW)? Provisionally, the answer appears to be "No".

73. Is there any basis for thinking any claim might be made by Coy or a liquidator of Coy in respect of interest payments made by Coy to JHIL or other James Hardie companies prior to 15 February 2001? Provisionally, the answer appears to be “No”.

M.FUTURE MANAGEMENT OF THE MRCF’S LIABILITIES

74. Are the mechanisms under the *Corporations Act* adequate for the administration of MRCF’s liabilities - in particular, in circumstances where present, but not all expected future, claims can be met is it possible to achieve a fair adjustment of the rights of past and unknown future claimants on an inadequate fund? Is:

- (a) liquidation;
- (b) voluntary administration; or
- (c) a scheme of arrangement

an adequate mechanism in the circumstances?

- (I) If not, what reforms, if any, should occur?
- (II) Do laws in other jurisdictions offer any valuable guides?
- (III) Would introduction of reforms along the lines of Chapter 11 of Title 11 (Bankruptcy) of the *United States Code* offer better mechanisms to deal with the problems that arise?
- (IV) Should legislation specifically aimed at either the particular circumstances of the MRCF, or of asbestos claims generally, be adopted in preference to reform of the *Corporations Act* that might operate more generally?
- (V) Having regard to:
 - (a) the reasons and recommendations in Chapter four of the Companies and Securities Advisory Committee’s Final Report on Corporate Groups (May 2000);

- (b) the treatment of corporate groups in existing state legislation (eg. concerning land tax, payroll tax, and workers compensation);
- (c) any other relevant matters;

should the Commission recommend reform of the *Corporations Act*, or other legislative change, which would have the effect of restricting the application of the limited liability principle in the context of tortious claims relating to corporate groups? Would it be appropriate for such purposes to confine the benefit of limited liability to members of the ultimate holding company.

75. If there are claims potentially available to MRCF, Amaca/Amaba or their creditors, or which would be available to a liquidator, arising out of the matters raised in the issues listed above which would assist to ensure that legitimate claims against Amaca/Amaba were ultimately satisfied, should the *Corporations Act* be amended to permit or facilitate any such claims or to qualify or remove defences which might be available to them? Would it be preferable to amend other laws rather than the *Corporations Act*?

Dated: 28 June 2004

JOHN SHEAHAN S.C.

ROBERT KELLY

DOMINIQUE HOGAN-DORAN

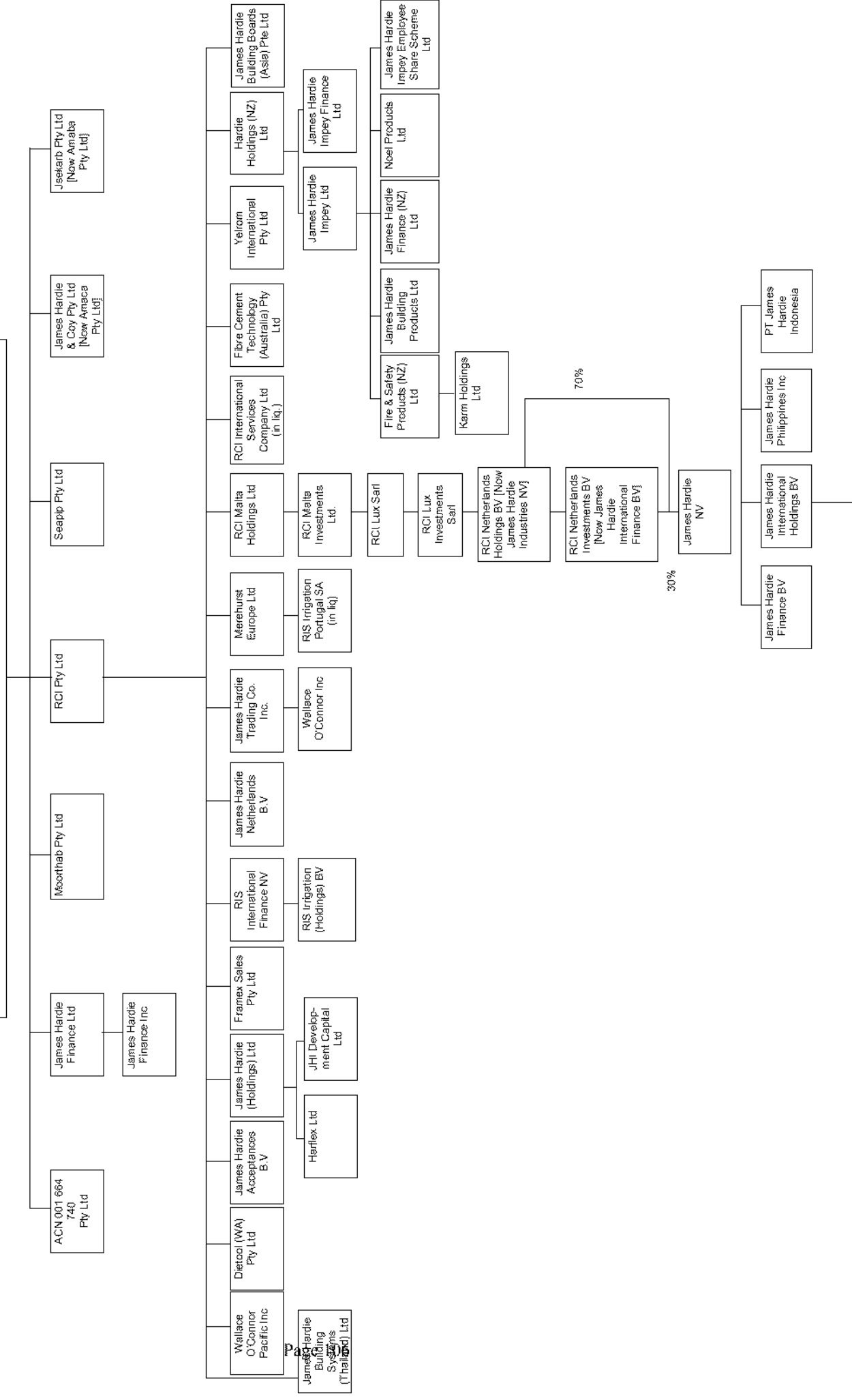
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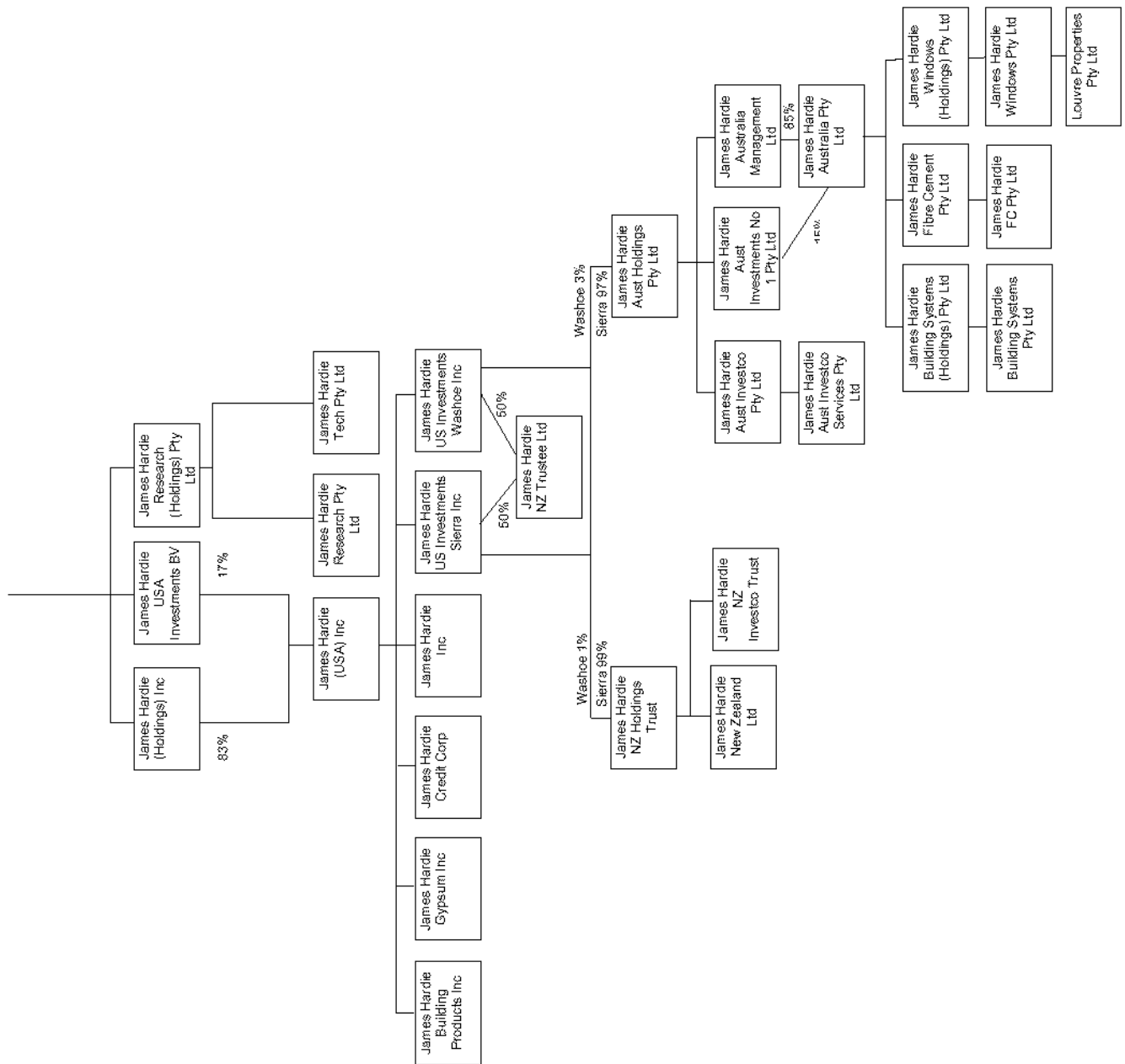
COUNSEL ASSISTING

ANNEXURE I

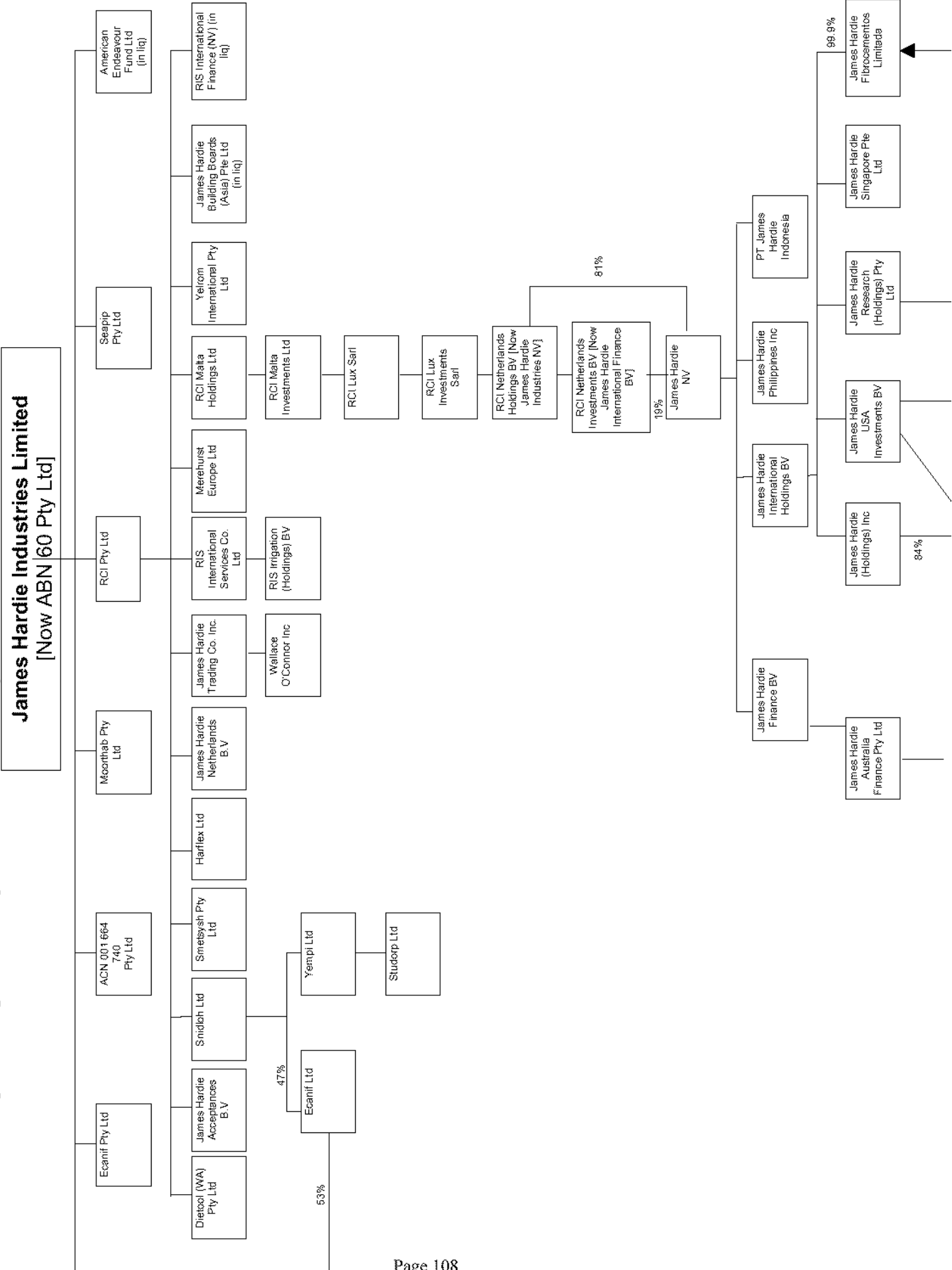
The James Hardie Companies Group Structure Diagrams

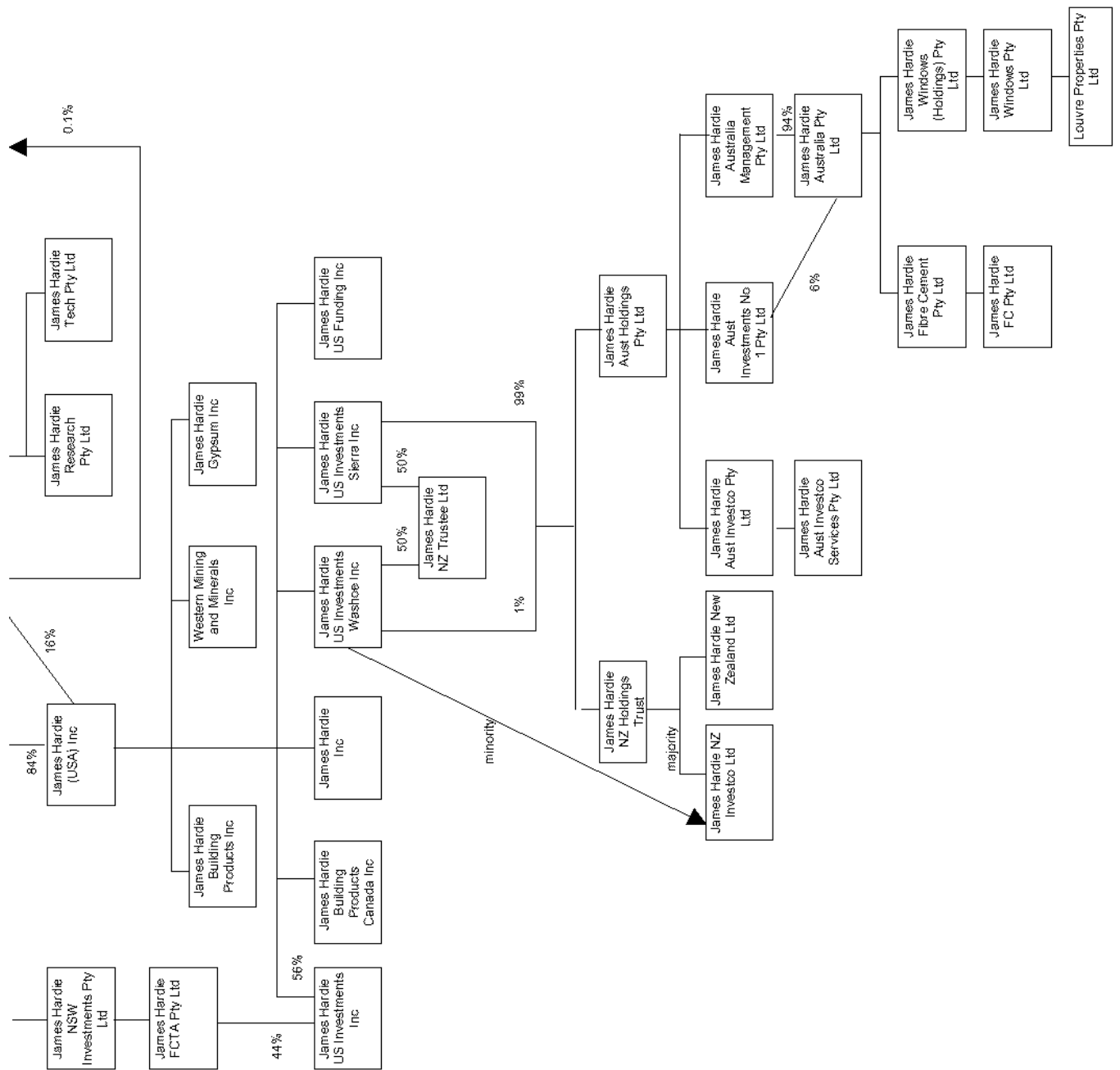
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[Now ABN 60 Pty Ltd]



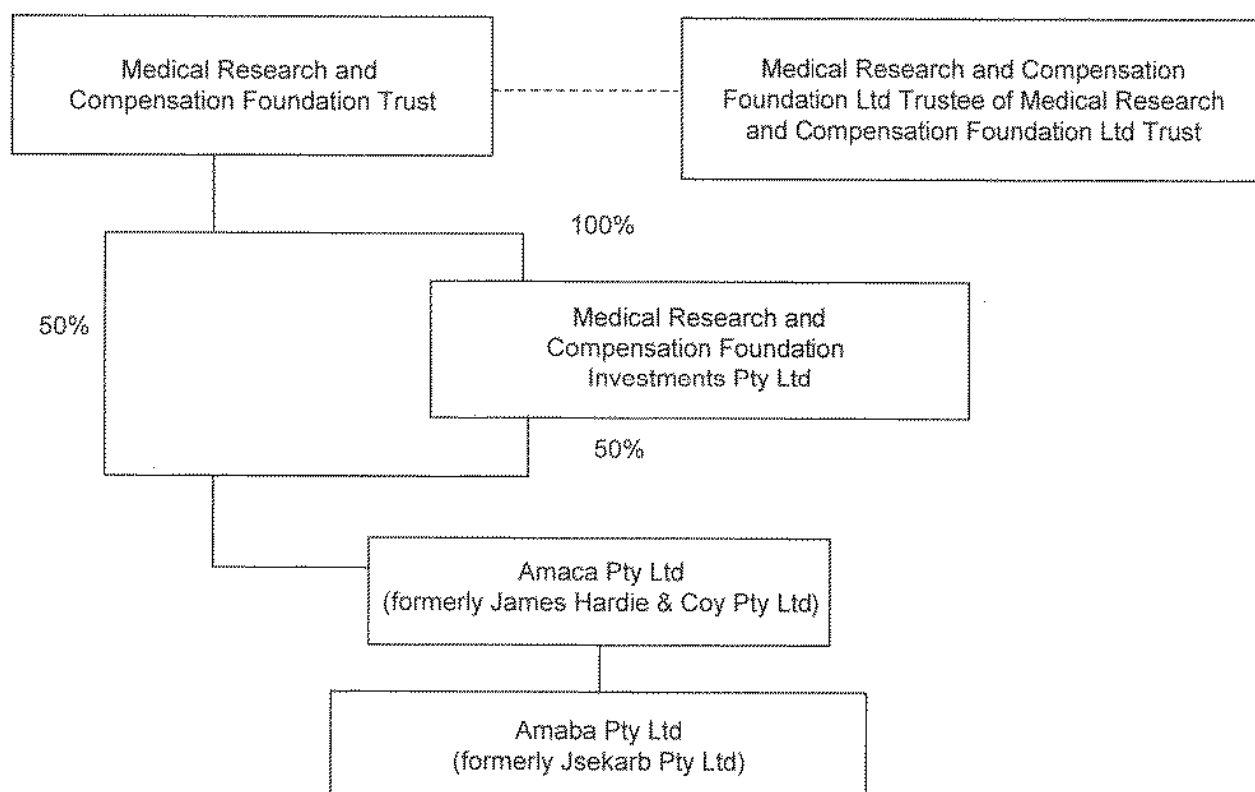


James Hardie Group following asbestos separation on 16 February 2001

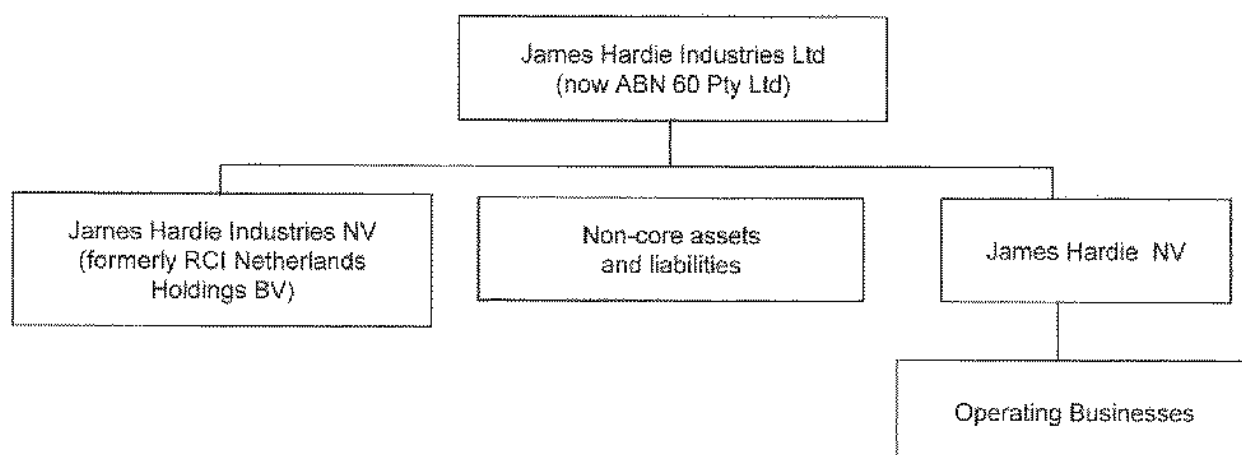




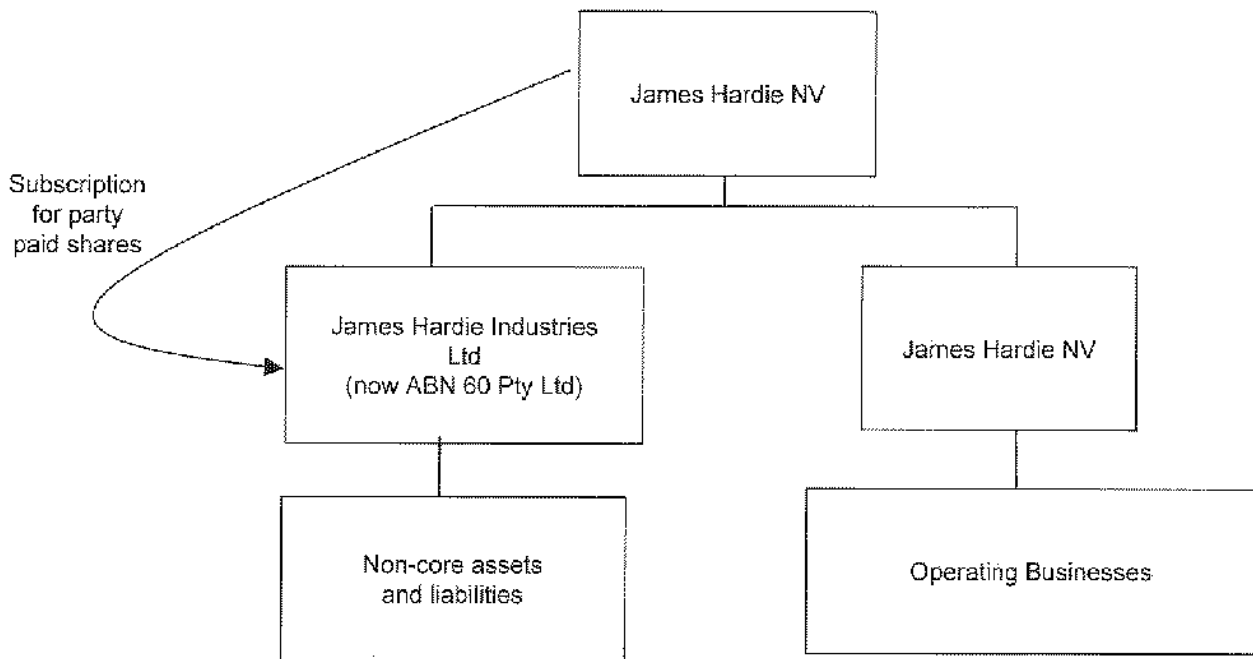
Medical Research and Compensation Foundation Corporate Structure following separation from James Hardie Group as at 16 February 2001



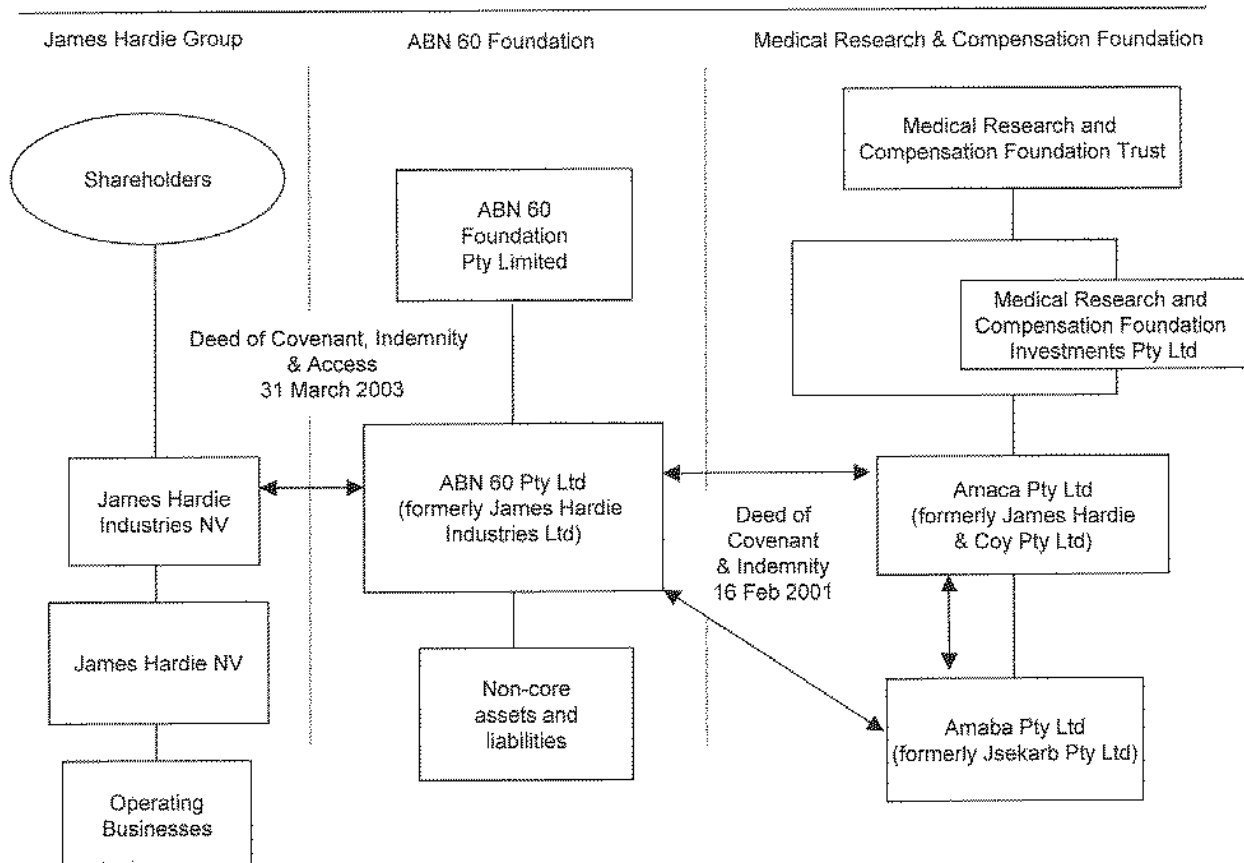
James Hardie Group just prior to scheme of arrangement of 19 October 2001



James Hardie Group post scheme of arrangement of 19 October 2001



Relationship between James Hardie Group and MRCF Post Scheme of Arrangement and Cancellation of Party Paid Shares on 31 March 2003



ANNEXURE J

Asbestos and James Hardie

Asbestos-Related Liabilities¹

A. Asbestos Mineralogy

Asbestos is a family of crystalline hydrated silicates with a fibrous geometry and unique physical and chemical properties. Asbestos fibre is classified into two groups, serpentine and amphibole. Chrysotile (or “white asbestos”) is the only member of the serpentine group. Crocidolite (“blue asbestos”), amosite (“brown asbestos”), tremolite, anthophyllite and actinolite are amphiboles. The amphiboles are characterised by long rigid fibres. Chrysotile fibres are curly and tend to break into smaller fragments. The general medical view was that white asbestos was of a lesser toxicity than blue and brown asbestos, although that has been recently questioned in light of an increasing experience of claims associated with exposure to chrysotile in the United States. 2

B. Industrial Use Of Asbestos

Asbestos has been used widely throughout history because of its strength, flexibility, durability and its resistance to heat, acids and alkalies. The majority of asbestos used in Australia was incorporated into asbestos cement, i.e. cement reinforced with asbestos fibres. There were two main categories of asbestos cement product, building materials and pressure and sewerage pipes. The building materials included corrugated sheeting, flat sheeting, roof tiles and moulded products such as gutters and telecom pits. High density asbestos cement was used for thermal and electrical insulation, such as in furnaces, bench tops, fume cupboard linings and switch gear. Asbestos cement poses fewer health risks than certain other types of asbestos-containing products because the asbestos fibres are firmly bound into a cement matrix.

The second largest category of asbestos use was as a filler or reinforcement. The main products within this category included asbestos-containing paper and millboard which were used in the manufacture of products such as roofing felts, clutch facings, brakes and gaskets. Asbestos fibres were added to paint to give various textured finishes, strength, heat resistance and opaqueness. Many plastic sheets and tile flooring products contained asbestos. Asbestos packings and seats were used in a wide range

¹ Except where otherwise indicated, the material contained in this Annexure is in significant measure derived from a document prepared by Mr Attrill, then Litigation Manager for the James Hardie Group, which was provided to the incoming directors of the MRCF on 15 January 2001: Ex 2, Vol 3, pp. 456, 457. The note gives some content to the expression “asbestos related liabilities” and what is comprehended by that concept. Mr Attrill himself adapted the work of A.R. Johnson, *An Analysis of the Cases of Malignant Mesothelioma Compensated by the Workers Compensation (Dust Diseases) Board of New South Wales*, thesis for the degree of Master of Occupational Health and Safety, University of Sydney (1997), pp. 3–31. The Annexure has been prepared with reference to the expert evidence of Mr Whitehead (Ex 251) and Mr Wilkinson (Ex 256).

of products, for example, gaskets. Asbestos reinforced plastics were incorporated in automotive components, small machine parts, road signs and bearings.

Asbestos is an excellent insulation material. Fire resistant insulation boards were similar to asbestos cement products but had a much higher asbestos content, 25% to 40% versus 10% to 15% by weight. They were widely used for partitions and suspended ceilings as a barrier to fire or to protect structural steelwork. Asbestos lagging for thermal insulation was made in the form of rigid pipes, slabs, pre-formed sections or sprayed coatings. Sprayed on asbestos insulation was easier to apply, particularly on uneven or hard to get at surfaces. Pipe and boiler lagging was commonly used in ships, engineering works, power stations, factories, hospitals and other large buildings. Woven asbestos was used to manufacture asbestos quilts, mattresses, and blankets for thermal insulation. These were often used on ships. Asbestos cloths were made into protective clothing and safety curtains. Asbestos cord or rope was used for thermal insulation on small domestic and industrial pipe work. Asbestos yarns and fabrics had a high asbestos content, up to 100%.

Currently world usage of asbestos is confined to chrysotile and to four principal product categories; asbestos cement, friction materials, roof coatings and cements, and gaskets. Approximately 85% of chrysotile used worldwide is for production of asbestos-cement products (pipes and sheets), mainly in developing countries. In 1992, approximately 28 million tonnes of asbestos-cement products were produced in about 100 countries. About 10,000 tonnes of chrysotile asbestos is imported in Australia annually for use in friction products. The use of asbestos is being progressively phased out across the world.

C. The Australian Asbestos Industry

Mining

For much of the 20th Century, with the exception of the early 1980s, most of the asbestos fibre used in Australia was imported.³ Until the re-opening of the Woodsreef mine at Barraba in 1970, the only mine of note was the Wittenoom mine in Western Australia which produced blue asbestos from about 1937 until 1967. The Woodsreef mine produced white asbestos and approximately half of its production was exported. Asbestos mines were operating around 1918 in Tasmania and at Baryulgil in NSW. Small mines produced crocidolite in South Australia from as early as 1916 until the 1950s but never in large amounts. Australian Blue Asbestos Pty Limited (a subsidiary

² Wilkinson T 3340.15-22, 28-39

of CSR) started production at Wittenoom in the Pilbara region of Western Australia in 1938. The mine ceased production in 1966 as it was unprofitable. In 1997 to 1983, Woodsreef operated at Barraba, NSW, the largest chrysotile mine in Australia. Australia was never a large producer of asbestos fibre; in 1952 it produced only 0.2% of world production.

Asbestos Fibre Production and Use in Australia

The bulk of asbestos used in Australia during the 20th Century (perhaps over 90%) was used to produce asbestos cement.⁴ Asbestos cement refers to cement that has been reinforced with asbestos fibres to produce a much stronger and more useful product. The presence of asbestos can also render the product harder and more fire resistant.

Prior to 1916 asbestos cement products were imported from England and Europe. In 1916 the Wunderlich company (later part of CSR) opened a factory in Cabarita, a Sydney suburb. Other factories (including those operated by James Hardie) soon followed. The peak period for the industry was following World War II when demand outstripped supply. For example, it became necessary to order pipe for large civil projects many years in advance and State Governments rationed supply.

Asbestos cement sheeting was liberally used in housing during this time. Between 1945 and 1954 more than 70,000 homes were built using asbestos cement cladding in NSW, 57% of the homes built in the State. In Australia as a whole 25% of new houses were built with asbestos cement. The bulk of asbestos fibre used was chrysotile from Canada. The addition of amphiboles helped speed up the rate of production and strengthen the product. Amosite was the major amphibole used and was imported from South Africa, some crocidolite from the Wittenoom mine (operated by a CSR subsidiary) in Western Australia was also used. Crocidolite's use was limited as it was more expensive and added a blue discolouration to the product.

Consumption

Australia has been one of the largest consumers of asbestos in the world. During the 1950s Australia was the fourth largest consumer of asbestos cement products and the highest per capita user of asbestos in the world (predominantly chrysotile). There was a rapid increase in the use of asbestos in Australia for the 30 years from 1940 to 1970, followed by a relatively stable volume during the 1970s. The decline in usage was even more rapid than the increase, with consumption dropping to relatively small

³ Whitehead Ex 251, para. 3.5.14, Figure 3.3: Volume of Asbestos Mined in Australia and Imported

⁴ Whitehead Ex 251 para 3.5.19

amounts by 1985 and to very small amounts by the end of the 1980s.⁵ The use of asbestos in Australia was effectively banned from the end of 2003.⁶

Because industrial and commercial use of asbestos was widespread in Australia up to the 1980s, recipients of claims have included government bodies (e.g. the Royal Australia Navy, State Rail Authority, Land & Housing Commission, Pacific Power), manufacturers (e.g. JHIL, Coy and Jsekarb, CSR Limited through its subsidiary Seltsam), employers (e.g. major construction companies) and occupiers of sites where asbestos was used (e.g. power station operators).

D. Asbestos Exposure

Asbestos fibres can cause various diseases when inhaled. The risk of disease depends on the type of fibre the concentration of asbestos in the inhaled air and the period of time over which the person was exposed. Long thin fibres (typical of amphiboles like crocidolite) are generally more carcinogenic than shorter thicker ones (typical of chrysotile), possibly because amphibole fibres are not cleared as quickly from the lungs. Fibres less than 5 µm in length are mostly removed by the lungs' own clearance mechanism. Fibres longer than 5 µm are mostly deposited in the respiratory and terminal bronchioles and it is these fibres that may subsequently cause disease.

Occupational Asbestos Exposure

Exposed to asbestos fibres from products or manufacturing processes is said to occur in various ways.⁷ Exposure usually occurred at work, although cases of domestic exposure (a wife washing her husband's work clothes, for example) are not uncommon. Claims have also been received from waterside workers who allege exposure to raw asbestos while unloading or handling bags of asbestos fibre which has been imported or shipped.

Raw asbestos is used in asbestos cement manufacture. The asbestos dust levels generated in asbestos cement manufacturing factories was generally lower in comparison with other manufacturing processes involving asbestos. Progressive introduction of control measures from the late-1950s helped reduce dust levels in factories. A medical surveillance scheme for James Hardie workers was established in the 1960s and a full-time doctor was employed from 1967 to advise on all aspects of asbestos health related issues.

⁵ Whitehead Ex 251 Figure 3.2: Annual Average Decadal Usage of Asbestos Fibre in Australia

⁶ Whitehead Ex 251 para. 3.5.11

⁷ Whitehead Ex 251 Figure 3.4: Relative Consumption of Asbestos by Industry; see also para. 3.5.50–51 (Categories of persons who might have been exposed to asbestos)

Most asbestos products destined for the construction industry did not undergo any further manufacturing operation between the factory and the construction site. However flat and corrugated asbestos cement sheets and asbestos cement pipes were cut, drilled or processed on site and these processes could release asbestos fibres and dust which were then inhaled by workers or bystanders. From 1978 Coy's asbestos cement products carried warning labels. Prior to this Coy provided use instructions which recommended that users take steps to keep dust down (such as wetting the product while cutting it).

Exposure to asbestos in friction products occurred in the manufacture and maintenance of those products, particularly amongst motor mechanics. However, the risk of contracting an asbestos-related disease from exposure to brake linings is not high due to the fact that friction products only contained chrysotile and because of the low and intermittent exposure to asbestos experienced by mechanics.

Environmental Asbestos Exposure

Due to the widespread use of asbestos in industrialised countries some exposure to asbestos is probably universal, particularly in urban areas. Asbestos fibres have been found in water supplies and food products. Asbestos fibres are commonly found in the lungs of city dwellers. Whether asbestos exposure in the general population at these low levels causes disease is contentious and, on present scientific evidence, is most unlikely. That is, exposure to a greater than background level of asbestos is necessary to develop disease.

E. Diseases Associated With Asbestos Exposure

There are four principal asbestos-related diseases:

- (a) **Mesothelioma** – a disease in which cancer (malignant) cells are found in the sac lining the chest (the pleura) or abdomen (the peritoneum);
- (b) **Asbestosis** – a progressive scarring of the lungs which is potentially fatal;
- (c) **Lung Cancer** – which may in certain circumstances be caused by exposure to asbestos; and
- (d) **Asbestos-related Pleural Disease** – a range of non-malignant conditions similar to asbestosis which are caused by inhalation of asbestos fibres. ARPD can range from asymptomatic pleural plaques to extensive pleural fibrosis causing severe breathlessness.

Malignant Mesothelioma. Malignant mesothelioma is the most serious asbestos-related disease. The typical life expectancy from diagnosis is six to nine months. It is a diffuse malignant tumour usually of the pleura or peritoneum. Although it can take

30 years or more to manifest itself from the person's first exposure to asbestos, once the tumour starts growing it is unusually aggressive.

The connection between asbestos exposure (crocidolite) and mesothelioma was first established by Wagner in South Africa in 1960. The relative risk for developing mesothelioma is dependant on fibre type, dose and time since first exposed. Thus, those exposed at younger ages are at higher lifetime risk. However, mesothelioma is associated with a wide range of exposure duration and pulmonary asbestos burdens, including sometimes seemingly small exposures.

Families of asbestos workers exposed to asbestos on hair and clothing have been found to be at risk, as are employees who worked in the same vicinity as asbestos workers. The risk of mesothelioma in workers exposed to chrysotile is much lower than the risk in workers exposed to amphiboles (especially crocidolite) or to mixtures of fibres containing amphiboles.

Asbestosis. Asbestosis refers to interstitial pulmonary fibrosis resulting from asbestos exposure. The more intense the dose, the earlier and ultimately more severe the fibrosis. During the 1920s and 1930s asbestosis was common and often took as little as seven to eight years to develop in a worker. Regulation of the industry and voluntary dust suppression measures lowered exposure levels and decreased the incidence of the disease. The diagnosis of asbestosis requires sufficient past exposure to asbestos to place the individual at substantial risk. Asbestosis is unlikely to occur unless there has been exposure to at least moderate concentrations of asbestos for more than a few years. Chrysotile can cause asbestosis, and again the disease may take 20 or more years from exposure to manifest.

Lung Cancer. Asbestos is a known carcinogen and the incidence of lung cancer is higher among asbestos workers. All lung cancer types occur in asbestos workers. An estimated 5.7% of all lung cancers in men in the West of Scotland (an area which had a large shipbuilding industry) are asbestos related. The latency from first exposure is in excess of 20 years.

The relative risk for developing lung cancer depends on a number of factors, dose, fibre type, job type, smoking history and presence of pulmonary fibrosis. The general view is that there is approximately a multiplicative effect of smoking and asbestos exposure. That is, although both asbestos and smoking in their own right increase the risk of lung cancer, asbestos and smoking together increase that risk many-fold. At present, the Courts require evidence of asbestosis, or of exposure to asbestosis sufficient to cause asbestosis, before attributing a lung cancer to asbestos exposure.

Asbestos-related Pleural Disease – Pleural Plaques. Pleural plaques are the most common manifestation of asbestos exposure. Macroscopically, pleural plaques appear as shiny, white, slightly raised areas on the parietal thoracic wall and diaphragmatic pleura. Microscopically they consist of fibrous tissue. Asbestos fibres are rarely found in pleural plaques. Pleural plaques are probably not, *per se*, associated with an increased risk of lung cancer or any other disease. Rather, they are a marker of asbestos exposure. They occur some 15 years after exposure, and are associated with the duration and amount of exposure. Generally pleural plaques are asymptomatic (and are therefore non-compensable), but occasionally a person with plaques will claim damages for pain or for the fear of contracting a more serious disease.

Asbestos-related Pleural Disease – Benign Pleural Effusions. Benign pleural effusions occur in a small percentage of asbestos workers, usually less than 20 years after initial exposure to high concentrations of asbestos.

Asbestos-related Pleural Disease – Diffuse Pleural Thickening. Diffuse pleural thickening can severely impair ventilation and cause significant restrictions on lung function. Restricted lung function with a preserved diffusing capacity is the expected pattern.

Asbestos-related Pleural Disease – Rounded Atelectasis. Rounded atelectasis refers to a peculiar infolding of the pleura. These lesions can occur many years after exposure to asbestos and are probably sequelae of benign pleural effusions. The peripheral infolding of the lung is the result of the associated pleural thickening and can be mistaken for a tumour. They have a characteristic appearance on computed tomography of a ‘comet tail’ of vessels and bronchi leading into the lesion and associated pleural thickening, maximal adjacent to the lesion. Once formed they tend to persist relatively unchanged.

F. James Hardie’s Involvement with Asbestos

Coy’s was the dominant consumer of asbestos in Australia, averaging approximately 70% (60,000 tonnes) of all asbestos fibre consumed annually.⁸ Coy’s primary business was the manufacture of asbestos cement products. These came in the form of building products and asbestos cement pipes. Prior to the mid-1980s, Coy manufactured asbestos cement flat and corrugated sheets for internal and external wall cladding in buildings and for roofs, asbestos cement water and sewer pipes. Building products were originally imported from Italy but by the 1920s local production started at the

⁸ Whitehead Ex 251 para. 3.5.41, Figure 3.5 Relative Consumption of Asbestos by JHG vs Others; Wilkinson T 3391.26–30

Camellia factory in NSW. Production started soon after at factories in Victoria (Brooklyn) and at Newstead in Queensland. At a later stage the Rivervale plant in Western Australia was built and a joint operation in association with Wunderlich was established in Adelaide in the 1950s. In 1960 Coy became the sole operator of the South Australian business when it bought out Wunderlich's interest. Prior to 1974 Coy also manufactured asbestos insulation materials in a joint venture with CSR Limited, and also in its own right prior to 1964.

White asbestos (chrysotile) was by far the most common type of asbestos used by Coy, which at the time was thought to pose less risk of inducing mesothelioma than did crocidolite. Recent medical thinking suggests the conclusions about toxicity may not be correct. Chrysotile was mainly sourced its supplies from Canadian mines in Quebec and British Columbia. A James Hardie subsidiary, Asbestos Mines Pty Limited, owned and operated the small chrysotile mine at Baryulgil until its sale in 1975. However the total output of the mine was very limited. The major fibre used in the manufacture of asbestos cement products was chrysotile Brown asbestos (amosite) was not used in Coy products until the 1950s when new sources of the fibre were opened up in South Africa. The use of small quantities of amosite in asbestos cement products continued until about 1980. Coy used blue asbestos (crocidolite) in certain products from the mid-1950s until about 1968. The crocidolite was sourced from the CSR mine at Wittenoom. Because of its colour it was not able to be used for all products; its main use was in pressure pipes and building products that were not able to be seen in detail, such as roofing products. The use of blue asbestos was discontinued on the recommendation of James Hardie's medical officer, Dr S.F. McCullagh, in 1967–68.

The asbestos content of Coy's asbestos cement sheet and pipes ranged from 8% to 15%, and was predominantly chrysotile with small amounts of crocidolite (to 1968) and amosite.

Production of asbestos cement pipes began in 1926 but the use of asbestos cement pressure pipe for water and sewerage use did not become widespread until autoclaving of pipes was introduced in the early 1950s. Asbestos content of pipes was approximately 15% of which about 12% was white asbestos and the remainder amosite. During the period 1956–1968 crocidolite was also used (about 2%).

Asbestos containing insulation products were first manufactured by Coy in the 1930s and by the 1950s Coy had established itself in the market with a product called 85% magnesia. In 1964 Coy formed a joint venture with CSR and Bradford Insulation

known as Hardie-BI Company to make and market insulation products. Major products produced were 85% Magnesia and K-Lite. Both products contained about 15% amosite. The partnership was dissolved in 1974 and Coy ceased production of asbestos thermal insulation products.

Jsekarb manufactured brake linings for motor vehicles, railway wagons and locomotives. Coy had initially entered the brakes and friction products market in the early 1930s and had a well established business by 1950 under the brand name "Five Star". In 1963 Coy entered into the Hardie-Ferodo joint venture with Ferodo of the UK. Hardie-Ferodo carried out considerable product development work, particularly with regard to railway rolling stock brakes. With the withdrawal of Ferodo from the partnership in 1978, the business was renamed Better Brakes (later known as Jsekarb) and was ultimately sold to Futuris Corporation Limited in 1987. The only asbestos used in asbestos-containing friction products was chrysotile.

G. Litigation

Coy and Jsekarb, but particularly Coy, have been sued in respect of asbestos-related diseases in many cases in Australia.

The principal venue has been the Dust Diseases Tribunal of New South Wales, but not insignificant numbers of cases have been brought in the courts of other Australian jurisdictions.

In the course of such litigation it has been necessary for James Hardie to make admissions about its knowledge of the damage of asbestos at various times, and for findings to be made by courts on that quarter.

An example of admissions made is:

The Berry Admissions

*Berry v Aultas Pty Ltd & Ors*⁹ where Coy made the following admissions in relation to the period 1949 to 1971:

1. It manufactured Hardie's 85 per cent Magnesia blocks, sections and plastic composition between 1949 and 1964.
2. It manufactured Hardie-BI Company 85 per cent Magnesia blocks, sections and plastic composition in partnership with CSR Ltd and pursuant to an agreement with CSR Ltd and Bradford Insulation Industries Pty Ltd between 1964 and 1971.
3. The composition of Hardie's 85 per cent and Hardie-BI Company 85 per cent Magnesia blocks, sections and plastic composition was approximately 10–15 per cent asbestos and 85–95 per cent basic magnesium carbonate.

⁹ (1997) 14 NSWCCR 266

4. It manufactured Hardie's Caposite blocks and sheets between 1949 and 1964.
5. It manufactured Hardie-BI Company Caposite blocks and sheets in partnership with CSR Ltd and pursuant to an agreement with CSR Ltd and Bradford Insulation Industries Pty Ltd between 1964 and 1971.
6. The composition of Hardie's and Hardie-BI Company Caposite blocks and sheets was approximately 95–98 per cent asbestos bonded with sodium silicate.
7. It manufactured Hardie's High Temperature blocks, sections and plastic composition from 1950 to 1964.
8. It manufactured Hardie-BI Company High Temperature blocks, sections and plastic composition in partnership with CSR Ltd and pursuant to an agreement with CSR Ltd and Bradford Insulation Industries Pty Ltd between 1964 and 1967.
9. The composition of Hardie's High Temperature blocks, sections and plastic composition was approximately 12 per cent asbestos, 44 per cent basic magnesium carbonate and 44 per cent diatomaceous earth.
10. It manufactured Hardie's Asbestos Millboard sheets between 1950 and 1964.
11. It manufactured Hardie-BI Company Asbestos Millboard sheets in partnership with CSR Ltd and pursuant to an agreement with CSR Ltd and Bradford Insulation Industries Pty Ltd between 1964 and 1971.
12. The composition of Hardie's and Hardie-BI Company Asbestos Millboard sheets was approximately 10 to 15 per cent asbestos and 15 to 20 per cent cement mixed with diatomaceous earth and other inorganic fillers.
13. It manufactured Hardie's K-lite blocks, sections and plastic composition from about the mid-1950s to 1964.
14. It manufactured Hardie-BI Company K-lite blocks, sections and plastic composition in partnership with CSR Ltd and pursuant to an agreement with CSR Ltd and Bradford Insulation Industries Pty Ltd between 1964 and 1971.
15. The composition of Hardie's and Hardie-BI Company K-lite blocks, sections and plastic composition was approximately 10 to 15 per cent asbestos and 85 to 90 per cent hydrous calcium silicate.
16. It manufactured Hardie's Super High Temperature blocks, sections and plastic composition from the late 1950s to 1964.
17. It manufactured Hardie-BI Company Super High Temperature blocks, sections and plastic composition in partnership with CSR Ltd and pursuant to an agreement with CSR Ltd and Bradford Insulation Industries Pty Ltd between 1964 and 1971.
18. The composition of Hardie's and Hardie-BI Company Super High Temperature blocks, sections and plastic composition was approximately 12 per cent asbestos, 44 per cent basic magnesium carbonate and 44 per cent diatomaceous earth.
19. The type of asbestos fibre used in the manufacture of Hardie's and Hardie-BI Company 85 per cent Magnesia blocks, sections and plastic composition was amosite and possibly a small amount of chrysotile.
20. The type of asbestos fibre used in the manufacture of Hardie's and Hardie-BI Company Caposite blocks and sheets, High Temperature blocks, sections and plastic composition, Asbestos Millboard sheets, K-lite blocks, sections and plastic composition, and Super High Temperature blocks, sections and plastic composition was amosite.
21. No warning was printed, inscribed or otherwise attached to Hardie's and Hardie-BI Company 85 per cent Magnesia blocks, sections and plastic composition, Caposite

- blocks and sheets, High Temperature blocks, sections and plastic composition, Asbestos Millboard sheets, K-lite blocks, sections and plastic composition, and Super High Temperature blocks, sections and plastic composition to the effect that they contained asbestos or that contact with asbestos dust and fibre could cause asbestos-related disease.
22. Hardie's and Hardie-BI Company 85 per cent Magnesia, High Temperature and Super High Temperature blocks and sections were packaged in light brown-coloured cardboard cartons measuring approximately 38" x 18" x 18".
 23. Hardie's and Hardie-BI Company 85 per cent Magnesia, High Temperature, Super High Temperature and K-lite plastic composition was packaged in jute bags weighing approximately 40 pounds until the late 1950s when impervious five-ply kraft paper bags stitched at the top and weighing approximately 25 to 30 pounds were introduced.
 24. Hardie's and Hardie-BI Company Caposite blocks and sheets were packaged in timber crates measuring approximately 36" x 36" x 24".
 25. Hardie's and Hardie-BI Company Asbestos Millboard sheets were packaged in bale-board crates measuring approximately 48" x 40" x 3" to 5" with the names of the product and the names Hardie's or Hardie-BI Company stencilled onto the crates respectively from 1950 to 1964 and 1964 to 1971.
 26. Hardie's K-lite blocks and sections were packaged in light brown-coloured corrugated cardboard cartons measuring approximately 38" x 18" x 18" with green printing identifying the name of the product and the names Hardie's or Hardie-BI Company respectively from the mid-1950s to 1964 and 1964 to 1971.
 27. It knew that Hardie's and Hardie-BI Company 85 per cent Magnesia blocks and sections, Asbestos Millboard sheets, Caposite blocks and sheets, High Temperature blocks and sections, Super High Temperature blocks and sections may have required occasional cutting with knives or hacksaw blades for the purpose of installation.
 28. It knew that Hardie's and Hardie-BI Company 85 per cent Magnesia, High Temperature, K-lite, and Super High Temperature plastic composition required shaping when wet for the purpose of installation.
 29. It knew that Hardie's and Hardie-BI Company K-lite blocks and sections may have required occasional skutching or cutting with knives or hacksaw blades for the purpose of installation.
 30. It first became alerted during the mid-1940s to the suggestion that the inhalation of asbestos fibres could cause asbestosis, but only in circumstances involving the inhalation over a sufficiently lengthy period of time of considerable quantities of asbestos fibres contained in visible clouds of dust emanating from the handling of raw asbestos in its factory.
 31. It first became aware during the mid-1950s that the inhalation of asbestos fibres could cause asbestosis, but only in circumstances involving the inhalation over a sufficiently lengthy period of time of considerable quantities of asbestos fibres contained in visible clouds of dust emanating from the handling of raw asbestos in its factory.
 32. It first became aware in the late 1950s of the suggestion that the inhalation of asbestos fibres could cause lung cancer, but only as a rare complication of asbestosis in circumstances involving the inhalation over a sufficiently lengthy period of time of considerable quantities of asbestos fibres contained in visible clouds of dust emanating from the handling of raw asbestos in its factory.
 33. It first became aware in the mid-1960s that the inhalation of asbestos fibres could cause lung cancer, but only as a rare complication of asbestosis in circumstances involving the inhalation over a sufficiently lengthy period of time of considerable quantities of

asbestos fibres contained in visible clouds of dust emanating from the handling of raw asbestos in its factory.

34. It first became aware in the mid-1960s that the inhalation of asbestos fibres could cause mesothelioma, but only in circumstances involving the inhalation of crocidolite fibres during processes involving the handling of raw crocidolite in its factory."

An example of a finding, which goes beyond the admissions in *Berry* is:

*State Rail Authority (NSW) v Wallaby Grip Ltd*¹⁰ where Judge Curtis found that James Hardie had actual knowledge of the dangers of asbestos since 1938. His stated (at para. 108):

108 There is no evidence that between 1938 and 1950 the SRA had actual knowledge of the dangers to health posed by visible clouds of asbestos dust. Hardie did know. It is sufficient to refer to one exhibit only. SRA 26 reveals that on October 1938 Hardie's asbestos factory at Brooklyn in Victoria was the subject of tests carried out by the Victorian Department of Health to determine the concentration of asbestos particles in the air. The results were sent to Hardie. The report stated that: "*Certain authorities regard 5,000,000 asbestos particles per cubic foot of air as the maximum concentration to which workers should be exposed*" and advised that where workers were exposed to such concentrations, even intermittently, they should wear suitable dust respirators. Any visible cloud of asbestos dust contains a concentration above 5,000,000 particles per cubic foot.

The finding of actual knowledge was not disturbed on appeal.¹¹

¹⁰ (1999) 18 NSWCCR 193

¹¹ *Wallaby Grip Ltd v State Rail Authority of New South Wales & Ors; James Hardie & Coy Pty Limited v State Rail Authority of New South Wales & Ors* [2001] NSWCA 105 (24 April 2001)