

Lawyers



**LONG TAIL PERSONAL INJURY CLAIMS
CORPORATIONS AND MARKETS
ADVISORY COMMITTEE**

AUSTRALIAN LAWYERS ALLIANCE

CONTACT:

**Patrick McCarthy
Legal and Policy Officer**

Phone: 02 9258 7700

Fax: 02 9258 7777

Email: patrick@lawyers.alliance.com.au

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000 GPO Box 7052 Sydney NSW 2001
DX 10126 Sydney Stock Exchange ABN 96 086 880 499

T + 61 2 9258 7700 F + 61 2 9258 7777 E enquiries@lawyersalliance.com.au www.lawyersalliance.com.au

LONG TAIL PERSONAL INJURY CLAIMS

Executive Summary

The Australian Lawyers Alliance makes this submission to the Corporations and Markets Advisory Committee. The Alliance would like to thank the Committee for accepting this submission past the due date. The Australian Lawyers Alliance wishes to make its submission under the following headings:

1. Introduction
2. James Hardie and the Australian Lawyers Alliance
3. Avoiding the problem
4. Liability of parent and group Companies
5. Preliminary Test – Mass future claims
6. Extensions of general creditor provisions
7. Prohibition on intentional avoidance
8. External administration
9. Other necessary steps

The Alliance asserts that the rights of injured people to gain adequate and equitable compensation require promotion and protection. The Alliance recommends that corporations' law should develop so as to protect potential personal injury claimants where the solvency of the responsible company is in question or where that company is no longer in existence.

1. Introduction

The Australian Lawyers Alliance understands that the Corporation and Markets Advisory Committee is considering the proposal to strengthen the protection received by future unascertained personal injury claimants where solvency of the responsible company may be in question.

In doing so the Committee refers to the report of the *Special Commission of Inquiry into James Hardie* in 2004.

The Committee proposes that in certain circumstances, those who have a future personal injury claim shall be placed on the same footing as current creditors of the company responsible. The Australian Lawyers Alliance understands that the Committee is seeking to achieve a balance between protecting potential personal injury claimants, and also providing current creditors, and others, with business certainty.

The Lawyers Alliance understands that the Committee inquiry relates to whether this proposal would unduly compromise current corporate law and insolvency principles.

The Lawyers Alliance understands that this proposal would only apply where certain elements are satisfied. These elements are:

- That there is a strong likelihood of numerous future claims against a company that has already experienced an unusually high number of personal injury claims or is in an industry where many claims have already occurred. The Alliance proposes that an example of such a company might be building products company.
- That the circumstances giving rise to the claims and the class of persons who will bring the claims can be identified.
- That the extent of the company's liability can be reasonably estimated.

The Alliance understands that the proposal being considered may be divided into three main areas:

1. Extension of general creditor protections: The *Corporations Act* requires corporate decision making to consider its ability to pay its creditors. In doing so it aims to provide balance and an appropriate allocation of risk

between creditors and shareholders. So, where a mass future claim is afoot, the existing creditors' protection may be extended to unascertained creditors.

2. Prohibition on internal avoidance: The Committee is considering a proposal to introduce a new offence provision, and related compensation provisions, modeled on Part 5.8A of the *Corporations Act* in regards to employee entitlements. The aim of this is to send a clear message that deliberate avoidance of payment to personal injury claimants is unacceptable. This proposal would provide that a transaction may not be entered into where the intention of that transaction is to prevent the recovery of amounts, or significant amounts owing, in respect to unascertained personal injury claimants. The penalty for such a breach may result in up to ten years in prison and fines of up \$110,000. Also, any person involved would be in breach, not just the directors.
3. External administration: The Committee is considering the introduction of a requirement for external administrators to admit and make provision for mass future claims for personal injury. So, where a court determines that the liquidator is required to admit and make provision for mass future claims for personal injury, an external administrator would be required to inform known creditors at the earliest opportunity and provide for the payment of such claims in the future. Over time, future creditors will be able to make claims against funds set aside for future claimants. This process may be similar to that of s554A of the *Corporations Act*.

The Australian Lawyers Alliance supports this proposal to extend the rights of injured people. The Alliance agrees that where a corporation has a strong likelihood of numerous future claims, and / or the industry concerned has a high number of personal injury claims, certain legal provisions should be established in order to provide adequate compensation for the injured parties. This is especially necessary where liability can be reasonably estimated to a claim giving rise to a class action.

2. James Hardie and the Lawyers Alliance stance

In terms of identifying a company or industry where there is a strong likelihood of numerous future claims, or where there has been an unusually high number of personal injury claims associated with that industry, the Australian Lawyers Alliance must refer to claims associated with asbestos related disease and its association with the James Hardie group of companies.

The history of asbestos related disease in Australia is indivisibly linked to the James Hardie group of companies. There is an abundance of evidence sourced throughout the twentieth century that indicates that James Hardie knew of the detrimental consequences of asbestos. Despite this knowledge James Hardie only ceased asbestos production in 1987. The Australian Lawyers Alliance (formerly Australian Plaintiff Lawyers Association) made a submission to the Special Commission of Inquiry into the Medical Research and Compensation Foundation in April 2004. To view this submission please go to:

http://www.lawyersalliance.com.au/documents/public_affairs/James%20Hardie%20220404.pdf . The effect of this submission was that given the circumstances, there can be no doubt that the James Hardie companies are morally and legally responsible for their asbestos related disease legacy in Australia, a legacy that will endure for at least a generation.

It is in this context that the Australian Lawyers Alliance supports the proposition to make companies responsible for future unascertained personal injury claims. The Alliance cites the James Hardie case study as an example of how principles such as justice and the rights of the individual can be severely compromised when companies are responsible for injuries to their employees / claimants without adequate legal ramifications.

3. Avoiding the Problem

Given the major problem that has been identified in the committees letter and attachments, the Alliance believes that the first consideration in terms of amending the corporations law is to seek to prevent circumstances arising where a product or conduct of a company might cause such widespread injury or disease so as to necessitate the provisioning contemplated. Clearly, avoidance of the problem will be to the benefit of the corporation, the creditors and, most importantly, the customers who might otherwise become sick or suffer injury.

One method of avoidance is the prohibition on intentional avoidance with substantial penalties as proposed in the attachment to the committees letter.

Another is the creation of a duty on the corporation and its directors to place the interests of persons likely to be affected by the Corporations Acts on the same level as the interests of shareholders of the corporation.

Often in such cases the corporation's conduct is sought to be excused by directors who state that they would have acted but their only duty is to shareholders. The story of the Enron Chief who made just such a justification to Harvard Business School students is repeated in Gideon Haigh's book about the Hardie debacle, *Asbestos House*.¹

The Australian Lawyers Alliance proposes the creation of a legally binding statutory director's duty along the lines set out in Attachment One at page 12 of this submission.

4. Liability of Parent and Group Companies

The Alliance believes that the proposals contained in the committee's letter will be most effective if the ability to avoid the effect of the requirements is circumvented by making each company in a corporate group liable and responsible for the consequences of a subsidiary or related corporation's malfeasance.

This will ensure that such assets as are available within the group are subject to annexation in order to provide the funds necessary for future injured persons.

It will also preclude the temptation to shift assets out of the liable corporation, or to rely upon its lack of assets or capital, to avoid responsibility to the future injured.

This was certainly a factor in CSR's thinking when it faced the question of what to do about the risk of future claims from the Wittenoom mine operated by its subsidiary, Midalco Pty Ltd which had suffered a massive capital reduction just as the first claims were emerging².

The protection of the corporate veil was also a fundamental consideration in the planning by James Hardie to cut away its asbestos liabilities as revealed in the Special Commission of Inquiry into the Medical Research and Compensation Foundation.

This problem is in part, addressed by the prohibition on intentional avoidance proposal in the committees letter.

In the Alliance's (then known as the Australian Plaintiff Lawyers Association) submission to the Special Commission of Inquiry into Medical Research and Compensation Foundation in April 2004, we proposed that the problem to be statutorily addressed. The Alliance repeats it hereunder. Please see Attachment Two at page 15 of this submission.

5. Preliminary Test – Mass Future Claims

The proposed test requires that there have been claims of the type to be provided for against the company or another company. It is submitted that this pre-requisite is far too restrictive.

Often knowledge of the risk caused by the product or conduct, and indeed the existence of injuries caused by the product pre-date claims at law by many years.

¹ Haigh, G *Asbestos House: the secret histories of James Hardie Industries* Carlton North, Vic. : Scribe Publications, 2005

² see Vojakovic and Gordon "The Victim's Perspective" in Peters and Peters "Sourcebook on Asbestos Disease" Volume 13, Michie, 1996.)

For example, CSR Limited knew of the risk of cancer to Wittenoom asbestos miners in the 1940s. The first case of mesothelioma associated with the mine presented to Dr McNulty in 1959, and the first claim against the subsidiary (which had nominal insurance coverage for most of the period and had already embarked upon capital reduction) was not made until 1977. As a result of company tactics and government pronouncements, there would not have been "an unusually high number of claims" until the issue of some 300 writs against the company in January 1987. The company could long since have reorganised its affairs or liquidated itself before the threshold requirement set out in the reference could have been made out.

The same history might be said to apply to rubber products and bladder cancer; see *Wright v Dunlop Rubber*.³

Accordingly, the Alliance strongly urges that the test incorporate some other requirement than the existence of a high number of claims as a necessary prerequisite to the triggering of the other proposed provisions.

We suggest knowledge of an association between the product or conduct and the disease or relevant injuries in persons exposed to the product or the conduct.

6. Extensions of General Creditor Provisions

The Australian Lawyers Alliance supports the extensions proposed.

7. Prohibition on Intentional Avoidance

The Alliance supports such prohibitions as proposed.

However, the Alliance believes that priority should be afforded to future personal injury claimants in any liquidation, both as to the funds available from the recovery proceedings proposed, but also generally with respect to the other assets of the corporation brought into the administration and liquidation.

The case for this depends on a number of factors:

³ 1972 13 KIR 255

1. Had the persons who will be injured in the future, known of the injury at the time of exposure or use of the product, they could have secured their compensation against the assets of the corporation then available. They could have obtained judgments (and enforced them) which would have ranked them higher in the list of creditors than general unsecured creditors
2. Other creditors had an opportunity to order their relationship with the corporation for their own protection. Future injured persons did not.
3. The inability of the future injured to protect their entitlements is not due to any failure on their part to take steps to secure their interest. They, like employees who have accrued entitlements, are the innocent victims of malfeasance and misadministration;
4. The wealth and assets of the corporation depended on the very purchasers who committed their funds to buy the company product, unaware (unlike the company that was directly or constructively aware of the foreseeable risk) of the potential for harm that entailed. The company over the ensuing years returns that wealth to shareholders and eventually dissipates the assets so as to render the corporation liable to liquidation. Those who provided the direct source of the corporation's former and distributed wealth, who now are the victims of decisions taken years before to place the corporation's profit before their safety, deserve absolute priority in accessing whatever remains of the corporation's assets.

8. External Administration

The Alliance supports generally this proposal.

The reference to the US Bankruptcy Code causes concern, and the precise matters arising therefrom would need to be expressly addressed, as the Chapter XI procedures in the USA have, with some notable exceptions, proved disastrous for asbestos related disease claimants.

In the context of this proposal we repeat the submission made above regarding the priority to be extended to future claimants. They should not stand with other unsecured creditors on an equal distribution basis. We reiterate that other creditors had an opportunity to order their relationship with the corporation for their own protection. Future injured persons did not. It may be of course that such a result means that secured creditors receive nothing with the entirety of assets being retained to provide for the future claimants. That is unfortunate but a necessary consequence of the circumstances which we submit render future claimants higher in the order of priority. We believe that community attitudes and public policy would support that view.

The other proposals for marshalling assets, notifying claimants and representation seem reasonable.

9. Other Necessary Steps

In circumstances giving rise to the sorts of administrations and liquidations discussed in the committees letter there are several other things that the Alliance believes should occur in the interests of the future-injured:

- 9.1. All relevant insurance coverage against the risk that will manifest should be identified and secured.** The liquidation of insurers after acts which have given rise to long-tail liability has caused substantial problems for future claimants in the past. So too, the withdrawal of coverage on the basis that the insured corporation has failed to properly inform the insurer of the potential risk, contrary to the *uberrimae fidei*⁴ provisions of the insurance contract.

Any such potential contest should be identified and resolved at the earliest possible time and long before claims start in abundance.

Once that question is resolved, the insurance coverage for future claimants should be secured, either by requiring payment forthwith, entering a secured scheme which provides for payment over time and/or increasing the prudential reserve requirements for insurers at risk.

⁴ utmost good faith

It goes without saying that the funds obtained from insurers should be preserved solely for the future claimants and no other creditor.

9.2 The statute of limitations (ie any and all relevant limitations provisions) should immediately be suspended for all persons within the group identified as potential claimants. There may otherwise be arguments that awareness of the potential for injury starts time running such that by the time the injury occurs the person is out of time (and subject to prejudice arguments on an application for extension).

9.3 The provisions prohibiting claims for personal injury and death caused by breach of Section 52 of the *Trade Practices Act 1974 (Cth)* should be made inapplicable to all persons within the group identified as claimants. The future victims of corporate malfeasance should have at their disposal all available protections to further their rights including this important statutory consumer protection. They should not have to depend upon proving foreseeability of risk on the part of a company whose controlling officers have long since departed, if they can demonstrate misleading and deceptive conduct with respect to public statements (and public silence) on the part of the corporation, which has been a cause of their use of the product and subsequent latent injury.

Conclusion

The Australian Lawyers Alliance notes that the Corporation and Markets Advisory Committee is considering the proposal to strengthen the protection received by future unascertained personal injury claimants where solvency of the responsible company may be in question. The Australian Lawyers Alliance agrees that where a corporation has a high probability of many future claims, and / or the industry concerned has a high number of personal injury claims, legal provisions should be established in order to provide adequate compensation for the injured parties. This is especially necessary where liability can be reasonably estimated to a claim giving rise to a class action.

The Australian Lawyers Alliance stresses the need to promote and protect the rights of injured people.

Attachment One

Gordon, J 'Duty of Directors and Corporations to Prevent Foreseeable Harm'.
Presentation paper produced for Corporations Law teachers Association Conference,
Sydney, 8 February 2005

Duty of Directors and Corporations to Prevent Foreseeable Harm

Definitions:

"harm" means any injury, loss, or damage of which the risk as a consequence of the decision, activity, product, act or omission in question, is not far-fetched or fanciful;

"environment" means components of the earth, including:

- (a) land, air and water, and
- (b) any layer of the atmosphere, and
- (c) any organic or inorganic matter and any living organism, and
- (d) human-made or modified structures and areas,

and includes interacting natural ecosystems that include components referred to in paragraphs (a)–(c).

- (1) When a Corporation knows, or ought to know, that any decision, activity, product, act or omission by the corporation, or that any officer, employee, servant or agent of the corporation, has caused, or may in the future cause foreseeable harm to any person, or any class of persons, then:
 - (a) the directors of the corporation owe a duty to any person, or the class of persons foreseeably at risk, to prevent the harm, such duty to be of no less a standard than the duty owed to the corporation's own shareholders;

- (b) the corporation is required to take all steps reasonably necessary to warn such persons and to prevent the harm;
- (2) this section is intended to have extra-territorial effect;
- (3) this section is not intended to cover the field or to preclude the bringing of any other action at common law or pursuant to statute that may be open to prevent, or to provide a remedy or relief from, the harm;
- (4) this section is intended to create rights in persons who are harmed or suffer loss from such decision, activity, product, act or omission by the corporation, to recover damages for such harm or loss in an action for breach of statutory duty against the corporation, and the directors of the corporation or any of them;
- (5) breach of this section is an offence and renders the corporation and any director of the corporation liable to a fine of \$ and in the case of a director, to imprisonment for a period not less than x years.

The paper continues:

- (1) When a Corporation knows, or ought to know, that any decision, activity, product, act or omission by the corporation or that any officer, employee, servant or agent of the corporation, has caused, or may in the future cause foreseeable harm to the environment, then;
 - (a) the directors of the corporation owe a duty to the environment and to any person living in, or dependent upon, the environment foreseeably at risk, to prevent the harm, such duty to be of no less a standard than the duty owed to the corporation's own shareholders;
 - (b) the corporation is required to take all steps reasonably necessary to warn the local, state, regional or territorial, and national governments in which the environment is situate, and to prevent the harm;
- (2) this section is to have extra-territorial effect;

- (3) this section is not intended to cover the field or to preclude the bringing of any other action at common law or pursuant to statute that may be open to prevent or to provide a remedy or relief from the harm;
- (4) this section is intended to create rights in persons who are harmed or suffer loss from such decision, activity, product, act or omission by the corporation, to recover damages for such harm or loss in an action for breach of statutory duty against the corporation, and the directors of the corporation or any of them;
- (5) breach of this section is an offence and renders the corporation and any director of the corporation liable to a fine of \$ and in the case of a director, to imprisonment for a period not less than x years.

Attachment Two

Extract from the Australian Lawyers Alliance submission to the Special Commission of Inquiry into the Medical Research Compensation Foundation, April 2004. Available in full at:

http://www.lawyersalliance.com.au/documents/public_affairs/James%20Hardie%20220404.pdf .

5. Law Reform Proposal

5.1. Recovery under insurance policy from corporation in liquidation and recent Government reforms of Corporations Law – A model for corporate liability reform?

The Commonwealth parliament addressed the recovery of funds by company creditors against liquidated corporations by making available the funds of any insurance policy directed to the losses faced by the creditors. It finds expression in Section 601 AG of the Corporations Law.

APLA submits that a similar provision might address the specific problem contemplated in this inquiry.

The sort of provision needed might be along these lines:

6.2. Proposed Legislation

"Definitions; In this section;-

"acts or omissions" means act or omission which has caused the injury for which the applicant seeks or has been awarded damages;

"applicant" means a person who has suffered a physical or psychiatric injury or disease as a consequence of any act or omission or any alleged act or omission by a subsidiary company, its officers, servants or agents and includes any legal personal representative and any dependent of the applicant;

"benefit" means any fiscal or financial benefit including but not limited to transferred profits, dividends, receipt of cash, property, loan funds, shares or any form of chose in action; any financial or fiscal advantage including but not limited to taxation deductions, taxation benefits or the use of transferred losses which reduce net income, assets or profits; or any guarantee or indemnity;

"parent company" means any company that at the time of the acts or omissions of the subsidiary company owned, or held more than 50% of the issued shares of the subsidiary company, and at any time received a benefit from or by reason of the existence of the subsidiary company;

"subsidiary company" means any company that at the time of the acts or omissions of that company, was owned by or had more than 50% of its issued shares held by another company, which other company, at any time received a benefit from, or by reason of the existence of the company";

"successor company" means any company that succeeds to the parent company either by acquisition of a majority of shares of the parent company, or is assigned by the parent company or otherwise receives a benefit from the existence of the subsidiary company that the parent company would have received; or is incorporated by the parent company for the purpose (whether it be the sole purpose or otherwise) of avoiding liability of the parent company for the acts or omissions of the subsidiary company or any acts or omissions of the parent company;

xx)

- a) If any person suffers any injury as a consequence of acts or omissions of a subsidiary company, and is unable to recover damages for that injury from the subsidiary company, or from any insurer of the subsidiary company pursuant to Section 601 AG or otherwise, then the person (hereinafter "the applicant") may recover the amount of such damages from the parent company of the subsidiary company, or from any successor company of the parent company.

- b) For the purpose of giving effect to the recovery of damages referred to in (a), the applicant may:

- i) proceed to enforce any judgment obtained by the applicant from the subsidiary company against the parent company or any successor company as if the judgment against the subsidiary company was a judgment against the parent company or the successor company;*
- ii) proceed against the parent company or any successor company in any proceedings brought in relation to the acts or omissions, if it appears that the subsidiary company will be unable to satisfy any judgment ultimately obtained against it by the applicant.*
- c) In any proceeding of the kind referred to in b) i) brought by the applicant against the parent or any successor company, any acts or omissions of the subsidiary company are to be regarded as acts or omissions of the parent company and any successor company, and any judgment, but for the apparent inability of the subsidiary to satisfy such judgment, that might have been entered against the subsidiary, may be entered and enforced against any parent or successor company.*

Such a scheme - a statutory piercing of the corporate veil - may be regarded as somewhat radical, but it is unlikely to be often required, as historically judgments for injuries are likely to be satisfied by tortfeasors or their insurers. But it does provide the comfort in situations of which the present James Hardie case is an exemplar that an injured person, their family or dependents will not go uncompensated for corporate misconduct because of the inability of the subsidiary to meet its obligations. Where a parent or successor corporation has control over the subsidiary and has received a benefit from having the structure in place, we consider that most in the community would regard it as fair that the liability flows up (and if necessary along) the corporate chain.

Were it otherwise, then the ability for a corporate group to restructure itself to avoid liabilities is too easy, or only becomes subject to injured creditors through the problematic blunt instrument of insolvency law.



WHO WE ARE

Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

APLA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee that has branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2005. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine *Precedent* is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.