Submissions in Reply by James Hardie Industries NV and ABN 60 Pty Limited to Submissions on Terms of Reference 4

Special Commission of Inquiry into Medical Research and Compensation Foundation

1. Abbreviations

ABN 60	ABN 60 Pty Limited (formerly JHIL)
Amaba	Amaba Pty Limited
Amaca	Amaca Pty Limited
APLA Submission	Submission of APLA Ltd April 2004
CAMAC	Corporations and Markets Advisory Committee (formerly known as CASAC)
CAMAC Report	Corporations and Markets Advisory Committee *Corporate Groups Final Report May 2000*
Claimants	Entitled Claimants and Prospective Claimants
Corporations Act	Corporations Act 2001 (Cth)
Counsel Assisting Submission	Submissions of Counsel Assisting Section 5
Entitled Claimants	Claimants who could prove at the Relevant Date against any of the Group Companies for the purposes of Section 553 of the Corporations Act
Group Companies	Each of the companies in the MRCF Group.
JHIL	James Hardie Industries Limited
JHI NV Submission	Submission of James Hardie Industries NV and ABN 60 Pty Limited on Term of Reference 4
JHI NV	James Hardie Industries NV
LCA Submission	Submission of the Law Council of Australia, 14 July 2004
MRCF	Medical Research and Compensation Foundation
MRCF Submission	The Submissions of the Medical Research and Compensation Foundation, MRCF (Investments) Pty Limited, Amaca Pty Limited and Amaba Pty Limited. Part D "The Way Forward"

PJC Report	Parliamentary Joint Committee on Corporation and Financial Services *Corporate Insolvency Laws: A Stocktake* Report
Prospective Claimants	Claimants who could not commence proceedings against any of the Group Companies at the Relevant Date but would later have a claim
Relevant Date	See Appendix A to the JHI NV Submission
Submissions	The APLA Submission, Counsel Assisting Submission, Law Council Submission, MRCF Submission and the Union Submission
TOR 4	Terms of Reference 4
Union Submission	Submissions on behalf of Unions and Asbestos Support Groups, Chapter 11: Submission on Term 4

2. A Legislative Solution

2.1 On Wednesday, 14 July 2004 the board of JHI NV resolved that:

> "In the context of the Company's submission to the Special Commission of Inquiry into the Medical Research and Compensation Foundation on Wednesday 14 July 2004:
>
> Directors would recommend that shareholders approve the provision of additional funding to enable an effective statutory scheme to be established to compensate all future claimants for asbestos-related injuries caused by former James Hardie subsidiary companies".

Shareholder approval for such a contribution would be by ordinary resolution.

JHI NV's Submission set out the key principles for an effective statutory scheme which were:

- speedy, fair and equitable compensation for all Entitled and Prospective Claimants; the method of distributing the scheme funds, including the level and type of monetary benefit paid or other benefit received, determined having regard to an independent assessment of the medical condition of the claimant and other objective criteria (thereby reducing superimposed or judicial inflation);
- independent administration of the scheme to maximise efficiency for the benefit of all parties;
- determination of contributions to be made in a manner which provides certainty to:
  - Claimants as to their entitlement
  - the scheme administrator as to the amount available for distribution; and

- the contributors as to the ultimate amount of their contribution to the scheme;

- significant reduction in legal costs via the removal of the requirements for litigation, achieved through conditions which need to be satisfied to access the scheme, which should be clear and should not involve potential for significant legal dispute;
- limitation of legal avenues outside of the scheme;
- provisions to protect liquidity to ensure payments to claimants, such as periodic and defined step-ups in annual contributions to the scheme (as well as later step downs, if appropriate), more extended payment periods, or a combination of both mechanisms;
- the assignment to, or subrogation of, the scheme to any rights which a participating claimant may otherwise have against any other party (eg. Insurance);
- administration and maintenance of the scheme by the NSW Government in line with other statutory compensation schemes or mechanisms (eg. workers compensation and dust diseases tribunal and/or board);
- protection of the scheme against costs arising from future legislative change; and
- defined adjustments to payment schedules based on claimants' ability to seek redress from those other interested parties which would encourage participation of other parties in the scheme and ensure an equitable outcome for all sufferers of asbestos related illnesses.

2.2 The Counsel Assisting Submission concluded that "rather than leave those interested in the fate of Amaca and Amaba to a quagmire of litigation, a legislative solution provides the best possible outcome for all parties." JHI NV agrees. Moreover, JHI NV believes, for the reasons set out below, that JHI NV's suggestion for a statutory scheme would lead to such a solution – and is the only one likely to be effective in providing speedy, fair and equitable compensation to Claimants compared with the complex and uncertain outcomes of other "solutions" submitted to the Commission.

2.3 Assessment of the likely effectiveness of any suggested "solution", and a comparison of likely effectiveness among alternative "solutions", can be made only by identifying the key goals to be achieved and objectively assessing whether, when and to what degree each alternative would satisfy these goals. JHI NV believes that the necessary and appropriate goals are:

- assuring, fair and equitable compensation for all Claimants;
- assuring additional funding for Claimants;
- assuring timely determination and payment of compensation to Claimants;
- avoiding recourse of Claimants to taxpayer funded Government programs to fund their Claims; and
- avoiding disincentives to business and investment in Australia and, in particular, in New South Wales.

2.4 The critical insight in the Submissions in response to TOR 4 was that of Counsel Assisting which is quoted in 2.2 above. However, as summarised in this Part 2, illustrated in Annexure A, any "solution" that rests on legislatively expanded liability imposed on JHI NV carries with it the burdens of significant cost, delay and uncertainties of ultimate unenforceability in connection with implementation efforts. This is to be contrasted with the short term certainty and long term permanency of the statutory scheme proposed by JHI NV.

2.5 The most effective way to ensure speedy, fair and equitable compensation for all Claimants is to work out a statutory scheme that JHI NV could recommend to its shareholders.

2.6 Ultimately, the solution suggested in the JHI NV Submission is consistent with, and could be used to achieve, Counsel Assisting's recommendation of a legislative scheme. JHI NV's suggested statutory scheme offers the best avenue to provide speedy, fair and equitable compensation to Claimants in an acceptable and workable timeframe.

2.7 The solutions suggested in the other Submissions, except for Counsel Assisting's suggestion of a statutory scheme developed on a consensual basis, raise significant external issues that make them incapable of speedy implementation and create the risk of adverse and unintended consequences. For example, implementation of broad legislative reforms, such as a United States Chapter 11-like mechanism in external administrations or exceptions to the fundamental premise of limited liability within corporate groups, have serious and far-reaching consequences for the Australian business community. Addressing those consequences would require thorough analysis and substantial dialogue among all interested constituencies. Prior proposals for such reforms have not been embraced[1] and there is a high likelihood of a broad, heated and extended debate to achieve even the first step – adoption of legislation. Not only is the pursuit of these alternatives unnecessary to address the Commission's charge – the resolution of the issues facing the MRCF – but given the general applicability of such alternatives, at best it is unclear whether they would benefit Claimants and, in any event, they would not present a solution capable of achieving results (if any) in the near future. Similarly, proposals for retrospective legislation seeking to impose unlimited liability on JHI NV for claims against Group Companies fail to provide a workable solution. Such legislation would unnecessarily raise substantial constitutional and/or other legal issues and would be of questionable enforceability outside of Australia.

2.8 Annexure A sets out a detailed comparison of the various proposals made in the Submissions.

2.9 Even if any of the alternatives proposed in the Submissions were enacted, such legislation would face the potential for protracted, costly and uncertain litigation, which, whether or not successful in challenging the legislation or its enforcement in other jurisdictions, would be detrimental to the intended beneficiaries of the Commission's recommendation: Claimants with asbestos-related illnesses.

[1] eg as to Chapter 11 see the PJC Report; as to exceptions to limited liability see eg the CASAC Report

2.10 The fundamental issue is the provision of sufficient funding and equitable treatment for all Claimants. None of the Submissions has made a recommendation that adequately provides for all Claimants short of implementation of broad reforms with uncertain outcomes that will be difficult to implement and apply.

2.11 The legislative scheme suggested by JHI NV, without creating the need to address the larger national issues raised by broader insolvency reform, utilises the mechanisms that have been acknowledged to have worked well in Chapter 11 asbestos cases in the United States, including:

(i) consideration of the interests of Prospective Claimants;

(ii) receipt of substantial additional funding in exchange for claims resolution and certainty as to the amount contributed; and

(iii) establishment of an independently administered scheme, with payment protocols that ensure equitable distribution of available funds among Claimants.

Moreover, the suggested scheme contemplates a significant reduction in legal costs via the removal of the necessity for litigation to establish compensation entitlement and amount, including the limitation of legal avenues for compensation outside of the scheme. JHI NV's proposal also contemplates the minimising of superimposed inflation.

2.12 A comprehensive and timely resolution of the matters currently before the Commission, particularly in light of the financial difficulties which actuarial estimates indicate the MRCF may ultimately face, is in the best interests of all parties. By incorporating the foregoing components into its recommendation, the Commission would provide certainty to Claimants as to their entitlement, the scheme administrator as to the amount available for distribution, and the contributors, including indirectly the shareholders of JHI NV, as to the ultimate amount of their contribution to the scheme.

2.13 The Board of Directors of JHI NV is deeply concerned that asbestos-related claims now are projected to be far in excess of amounts anticipated at the time of establishment of the MRCF. Subject to the Commissioner's findings, JHI NV is hopeful that its suggestion will serve as a catalyst for implementation of an effective statutory scheme that provides a comprehensive resolution of the matters before the Commission.

3. Application of the current provisions of the Corporations Act

3.1 The JHI NV Submission concluded that while Group Companies had substantial liabilities to both Prospective Claimants and Entitled Claimants, because damage was a precondition to a tort claim (and other relevant causes of action), the existing provisions of the Corporations Act did not clearly provide a preferred method for dealing with the future insolvency of a Group Company in connection with achieving the central objective of providing an equitable distribution of assets to all Claimants over time.[2]

[2] JHI NV notes that the MRCF Submission on the application of section 436A(1) (paragraphs 64.9 to 64.12) does not take account of the discussion of that section in *Crimmins v Glenview Home Units Pty Ltd* [2001] NSWSC 599 (unrep) (17/8/01)

3.2 The MRCF Submission[3], the Counsel Assisting Submission[4] and other of the Submissions[5] support this conclusion. Although there are differences in the detail of analysis used for those conclusions there is no difference in the substantive conclusions.

3.3 JHI NV submits that it is a common view of parties that the current arrangements available to Group Companies under the Corporations Act to assist Group Companies to manage their liabilities are unsatisfactory.

3.4 As a consequence, legislative reform is desirable to assist the Group Companies to manage their obligations to current and future Claimants or, to use the terminology of the JHI NV Submission, to Entitled and Prospective Claimants.

3.5 In this reply the Submissions put by other parties in relation to Terms of Reference 4 are considered under the following headings:

(a) particular proposals namely:

(i) adoption of Chapter 11-like reforms;

(ii) proposed reforms to limited liability;

(iii) other special purpose legislation,

(b) international issues;

(c) issues raised in particular proposals; and

(d) the superiority of the JHI NV scheme proposal.

4. Adoption of Chapter 11-like reforms

4.1 Submissions have been made to the Commission as to the benefits of amending the Corporations Act to implement Chapter 11-like reforms[6]. It has been suggested that such reforms would facilitate an efficient and effective resolution of the issues.

4.2 While this may be true, since Chapter 11 does not itself impose any funding obligations on third parties, the effectiveness of a Chapter 11 arrangement in the types of circumstances facing the MRCF is dependent on the voluntary contribution of additional funding from third parties.

4.3 Moreover, there has been much debate in Australia as to the appropriateness of the introduction of Chapter 11-like reforms[7]. That debate continues and there is significant risk

at paras 49-51 and that given the broad powers of the Court under section 447A, there may be an ability to extend the definition of creditor for the purposes of a specific Part 5.3A voluntary administration. However, the uncertainty and risk surrounding this issue reinforces the value of a specific statutory scheme to deal with the present circumstances.

[3] See paragraph 3 of Part D The Way Forward and clause 64.

[4] See clauses 1 to 5 of section 5.

[5] See page 6 of the Law Council Submission; see clause 11.19 to 11.29 of the Union Submission.

[6] see Union Submission at para 11.27; Counsel assisting Submission at para 40

[7] See eg PJC Report

that, if achievable at all, broader reform may not be achievable within any timeframe sufficient to ensure that existing and future Claimants of the MRCF will be fairly and equitably compensated. However, the desired elements of a Chapter 11-like approach can be included in a specific statutory scheme of the type suggested by the JHI NV Submission.

4.4 A number of the Submissions identify some of the difficulties with a Chapter 11 approach[8]. In JHI NV's view, implementation of US Chapter 11-like arrangements in the Corporations Act is an inappropriate method to deal with the issues raised within the context of the Inquiry. Rather, elements of the arrangements made under this style of insolvency proceeding could be utilised in the formulation of the scheme proposed by JHI NV. In particular, two of the central elements of the scheme being proposed are that it would provide benefits to Prospective Claimants and it would have a funding mechanism that would include contributions by JHI NV.

5. Proposed Reforms to Limited Liability

5.1 Overview

The submissions from Counsel Assisting, the Unions and Asbestos Support Groups and the MRCF, propose three different models for the reform of the principle of limited liability:

(a) **Proposal One**: Counsel Assisting recommended that the Corporations Act be amended so as to alter the operation of the principle of limited liability in relation to claims for personal injury or death caused by a company that is part of a corporate group. It is proposed that, in such instances, the principle of limited liability would apply only to the members of the ultimate holding company. Counsel Assisting suggested that such amendment could be made with retrospective operation. The MRCF and APLA each made a broadly similar submission;

(b) **Proposal Two**: The Union Submission submitted that legislation is necessary to sheet home to JHI NV liability for claims against the MRCF through lifting the corporate veil or otherwise, and to permit attachment of JHI NV's overseas assets. It further submitted that such legislation should:

(i) specifically deem JHI NV to have been the plaintiff in the application before Santow J;

(ii) render JHI NV liable to compensate aggrieved persons for all loss allegedly caused by JHIL relating to the application before Santow J; and

(iii) enable the attachment of JHI NV's overseas assets; and

(c) **Proposal Three**: The MRCF submitted that a doctrine of undercapitalisation should be adopted in Australian law. This doctrine would hold parent companies liable for undercapitalised/insolvent subsidiaries on the grounds that undercapitalisation is a form of misleading creditors.

[8] see LCA Submission at pg 7 para 3; see MRCF Submission para 67.1 para (d), (e) and (f) and para 67.2s

5.2 These varying proposals raise complex issues in relation to constitutional and legislative powers and substantial matters of law and policy, yet fail to address the issues of funding, avoidance of costly asbestos litigation and enforcement of any Australian judgment under such legislation in The Netherlands and/or the United States. These issues of enforcement are considered in Part 7 and Annexure B. Each proposal is considered in turn.

5.3 Proposal One

5.3.1 Constitutional and legislative issues

To recommend the reform of the principle of limited liability under the Corporations Act, the Commission would have to be satisfied that:

(a) the Commonwealth Government was prepared to reform the Corporations Act or that the NSW Parliament had power to pass legislation that would act alongside the Corporations Act;

(b) such amendments or legislation could properly have a retrospective effect;

(c) such amendments or legislation would apply to Claimants within and outside of NSW and Australia;

(d) that law reform is this area is desirable as a matter of policy; and

(e) such amendments or legislation could be enacted and enforced in a timeframe that would provide relief to the MRCF.

In addition, lifting the corporate veil between two companies that are incorporated and operating in different countries and subject to the laws of numerous jurisdictions clearly has the potential to give rise to a myriad of legal complications and conflicts of laws.

If such legislation could be validly enacted, there would still remain a real issue with respect to the enforcement of any judgment obtained under such legislation. The complexities in relation to enforcement are further explained in Part 7 and Annexure B.

5.3.2 Policy issues

Even if the reforms proposed by Counsel Assisting could constitutionally be implemented, there are serious questions whether such reforms would be desirable because they would overturn the central principle of corporations law, namely, the principle of limited liability. It is to be questioned whether it would be appropriate for the Commission to recommend a reform with such wide ranging implications, based solely on the Commission's consideration of the facts and circumstances that are before it.

Four years ago, an almost identical proposal for the reform of limited liability was considered by the CAMAC Report. After receiving numerous submissions from a wide variety of industry groups, CAMAC concluded that the introduction of a general tort liability for parent companies in corporate groups is undesirable. CAMAC's strongest concern with the proposed reform was that it would undermine the separate entity principle and could have negative consequences for the economy.

As noted upon in the CAMAC Report, some submissions strongly emphasised the negative effects of the imposition of unequivocal liability on parent companies on the sustainability, vitality and competitiveness of Australian industry on a regional and global scale. These serious and far reaching consequences are exemplified within a corporate group where the separate entity doctrine promotes a diversity of aims and interests within its group structure. As neatly summarised in the Media Release attached to the APLA Submission "[a] company was meant to be a device for people of enterprise to try new ideas without risking everything".[9] Apportioning liability to the parent company would undermine the principle of diversity and undermine the incentive for risk taking and entrepreneurial activity.

The proposed reform has far-reaching consequences for all corporations in Australia. This Commission should not make recommendations on such reform without extensive public consultation with all affected parties. The objections which were received by CAMAC, which did undertake such a consultative process, were overwhelming. CAMAC considered changes to limited liability on an Australia wide basis. In the present case, if the reform to the principle of limited liability were restricted to NSW, providing that this could be done, then there would be a risk that any negative economic consequences would be particularly concentrated in this one jurisdiction with the potential to discourage corporations from carrying on business in this State.

The retrospectivity of the proposal also raises issues in relation to its legitimacy and enforceability.

In relation to the MRCF's proposal in paragraph 67.1 to adopt specific "see-through" liability legislation in relation to JHI NV, our comments with regard to the proposal of Counsel Assisting apply. It also should be noted that the MRCF made no attempt to define precisely the scope of the "more limited special purpose legislation" which it endorses.

5.4 Proposal Two

The Union Submission proposes particular statutory reforms in respect of allegations concerning conduct before Justice Santow and in relation to cancellation of the partly paid shares. The facts and conclusions that may be made in relation to those matters are subject to comment in the reply to Terms of Reference 2 and 3.

The proposal that the NSW Parliament enact specific legislation restricting the principle of limited liability as applicable to JHI NV is also problematic. It encounters many of the issues canvassed above in relation to Proposal One, including:

(a) the serious questions as to the power of the NSW Parliament to pass such legislation; and

(b) critical issues of enforcement of liability against JHI NV in The Netherlands and/or the United States.

[9] APLA Media Release October 31, 2003 (attached to APLA Submission)

The proposal for legislation specifically targeted at JHI NV as made by the unions and asbestos support groups again clearly raises a number of significant policy and enforcement issues.

The legislative reform called for in paragraph 11.52(a) of the Union Submission purports to deem as a matter of law that JHI NV was the plaintiff before the Supreme Court of NSW in relation to the approval of the scheme of arrangement.

This is an issue of fact and it would be odd for legislation to retrospectively deem that a fact arose in circumstances where it did not.

Further, the Union Submission suggests that legislation of the type proposed would somehow enable the attachment of overseas assets to the judgment of an Australian court. This premise ignores the necessity of obtaining the cooperation of the courts in the overseas jurisdiction. Overseas courts might well refuse to enforce an Australia court's judgment based on the proposed legislation if they conclude that the enforcement of such legislation was contrary to public policy in their jurisdictions. The enforcement of such legislation is considered further in Part 7 and in Annexure B.

5.5 Proposal Three

The MRCF proposes in paragraph 67.1 of its submission adoption of "the US doctrine of under-capitalisation" in accordance with an attached memorandum by Professor Ian Ramsay, in which Professor Ramsay discusses works by Professor Phillip Blumberg on the concept of undercapitalisation in United States case law. The MRCF does not articulate how the doctrine would be applied in the present circumstances.

The proposed "doctrine" of undercapitalisation has no relevance to the circumstances and facts in issue before the Commission as it is relevant only in situations where a company is established with insufficient capital at the time of inception.

In the present case before the Commission, it cannot be said that Amaca, Amaba or ABN 60 were established with insufficient capital and then promoted by their respective parent companies so as to mislead potential creditors. Professor Ramsay also notes that undercapitalisation is most significant in cases involving "intragroup contract liability". The facts and circumstances here do not fit that description.

Professor Ramsay's memorandum does not describe undercapitalisation as a legal doctrine that could, in any event, be clearly incorporated into law. Regardless, it is submitted that the proposal does not address the issues raised by the current situation.

6. Other Special Purpose Legislation

6.1 Procedural and Evidential Matters

The MRCF acknowledges in paragraph 66.2 of its submission that litigation of these matters is likely to be "lengthy, costly and time consuming". In an attempt to avoid these difficulties, the MRCF proposes various "further legislative reform" by "special purpose legislation" to facilitate recovery actions by Amaca and Amaba.

The specific legislative measures proposed by the MRCF are contained in paragraphs 66.7 and 66.8 of its submission. In paragraph 66.7, the MRCF outlines a "possible solution to avoid lengthy litigation", under which:

(a) "the Commissioner could be appointed an acting judge of the Supreme Court of NSW;

(b) the legislation could provide that the Commissioner could hear any application by parties authorised to appear before the Commission; and

(c) the Commissioner could use the evidence already given before him in determining those applications. In addition, any party could submit any other evidence relevant to the determination of the application before the Commissioner."

In paragraph 66.8 of its submission, the MRCF suggests legislation:

(a) for the admissibility of evidence and findings in the Commission in any subsequent proceedings;

(b) dealing with the release from confidentiality and privilege of all documents produced to the Commission;

(c) providing for a reversal of the onus of proof regarding findings of the Commission in any subsequent proceedings; and

(d) for the adoption of the United States bond system, which requires a foreign defendant to file a bond before they can defend litigation in certain circumstances.

These submissions misconceive the nature of a Special Commission of Inquiry. Although the Commissioner has many of the powers of a Supreme Court Judge under the *Special Commissions of Inquiry Act* 1983 (NSW) (SCI Act), it is clear that the Commissioner's duty under section 10 is to report to the Governor in respect of the subject matter of the Commission, and in particular whether there is any evidence or sufficient evidence warranting any prosecution of a specified person for a specified offence.

The core concept of judicial power is the ability authoritatively to determine disputes as to existing rights and liabilities under the law. The Commission lacks this power. It is because the Commission does not perform a judicial function that a witness cannot claim privilege when appearing before the Commission or if required to produce evidence to the Commission under section 23(1) of the SCI Act. The very next subsection of the Act clearly demonstrates that this extreme measure is in place because answers made, and evidence produced, to the Commission are not, except as provided in section 23, admissible in evidence against that person in any civil or criminal proceedings.

It is this very provision that the MRCF seeks in paragraph 66.12 of its submission to overturn by special legislation. The MRCF submits that the Commission has been carefully conducted, that all parties before it have been fully represented and that the rules of procedural fairness have been scrupulously observed but this is not the point. The Commission has its own charter and rules. However, those rules, particularly in respect of privilege, are not the same as those which govern a body charged with judicial power.

The concept of legal professional privilege is sacrosanct and a fundamental tenet of the judicial process. Whether documents are covered by legal professional privilege can, and

must only be dealt with in the Court which hears any proceedings relating to the subject matter of the Inquiry. We are not aware of any Australian legislation that eradicates, on a blanket basis, the right to assert legal professional privilege over documents and communications in judicial proceedings.

The MRCF also submits that many documents before the Commission "may" in any event not be subject to legal professional privilege on the ground that they evidence communications which have a criminal, improper or fraudulent purpose. Whether legal professional privilege is lost over particular communications or documents is a matter for determination by the Court, on a document-by-document basis, after consideration of the evidence.

Similarly, the MRCF submissions that the Commission has been carefully conducted, that all parties have been fully represented, and that rules of procedural fairness have been scrupulously observed do not provide any justification for the overturning of a fundamental principle of the justice system in the form of the onus of proof. On the MRCF's submission, a party would, in respect of adverse findings made by the Commission, be guilty until proven innocent or, if the Commission is turned into a court, simply guilty after the fact. These concepts are, with respect, repugnant to common law notions of a fair trial and natural justice and might render any result completely unenforceable in another jurisdiction (See Part 7 and Annexure B).

The proposal to legislate to constitute the Commissioner as an acting judge of the Supreme Court of NSW to hear applications by parties authorised to appear before the Commission and to allow the Commissioner to use evidence before the Commission, is an even more extreme proposal. Such a plan would again cut across fundamental principles of the justice system, including privilege and would give rise to complaints of lack of judicial impartiality. Further, the Supreme Court of NSW is a court vested with federal jurisdiction under section 39 of the *Judiciary Act* 1903 (Cth). As explained in *Kable v DPP* (NSW)[10], the Court consequently may not act in a manner incompatible with Chapter III of the Commonwealth Constitution, and must observe the separation of judicial and executive powers. The proposal would therefore be subject to extensive legal challenge on constitutional grounds. This would completely undermine its intended purpose of reducing the delay and expense of litigation.

6.2 Matters Relating to the Partly Paid Shares in ABN 60

The submissions of the MRCF and Counsel Assisting suggest that the NSW Parliament could pass legislation setting aside the cancellation of the partly paid shares held by JHI NV in ABN 60.

There are issues as to the legality of such an act. Section 5G of the Corporations Act has not been used to date for such a purpose and there are doubts as to whether it would permit the NSW Parliament to pass a law to set aside such transactions. Without admission of liability concerning the cancellation of the partly paid shares, section 256D of the Corporations Act expressly provides that a capital reduction that is wrongful is

[10] (1996) 189 CLR 51.

nonetheless valid. Accordingly, any law passed by the NSW Parliament to set aside the cancellation of the partly paid shares may be considered inconsistent with the Corporations Act, which is a federal statute and, therefore, may be invalid under section 109 of the Constitution.

The Corporations Act provides remedies where a capital reduction is undertaken in contravention of section 256B, and such remedies do not include rescission.

Moreover, "setting aside" the cancellation of the partly paid shares provides no additional funding to the MRCF. It would provide only a contingent funding right for JHIL in the event JHIL became insolvent.

There is also no justification for a general lifting of the statute of limitations as proposed by the MRCF in paragraphs 66.13 and 66.14 of its submissions. The MRCF provides no compelling justification for such a step. If, which is denied, but as the MRCF appears to allege, there has been any fraud, then the statute of limitations provides for extensions of the limitation period in that event.

7. International Issues

The difficulties associated with proposals which require assistance from foreign Courts need to be contrasted with the short and long term certainty of a proposal which is wholly within the powers of the New South Wales' legislature. JHI NV's understanding of the international enforcement issues raised during the course of this inquiry is set out in Annexure B.

8. Particular Proposals

In addition to the observations made above, set out below are some particular comments on the specific proposals.

8.1 MRCF Submission

(a) Hybrid Scheme of Arrangement

The MRCF Submission proposes a hybrid scheme of arrangement under State law which would be supervised by the Court but which would be operated largely in accordance with the rules which would apply to a Scheme of Arrangement propounded under section 411 of the Corporations Act.

JHI NV does not agree that a Scheme of Arrangement based upon a hybrid version of schemes of arrangements under the Corporations Act as proposed in the MRCF Submission provides an appropriate solution.

A scheme which is operated by an independent authority and which provides a long term solution for Entitled Claimants and Prospective Claimants is to be preferred to a solution which tries to selectively deal with various problems under section 411 of the Corporations Act and related provisions.

The proposal put forward by the MRCF does not appear to be likely to reduce legal costs and, in fact, is likely to increase costs because of the need for court supervision. A well constructed scheme operated by an independent regulatory authority under State legislation is, in JHI NV's view, more likely to give a long-term solution which provides for an equitable distribution of assets.

The elements of the Scheme of Arrangement proposed by the MRCF and comments on them follow:

(i) To resolve the difficulties associated with Prospective Claimants to provide for a "renewal" of the Scheme on an 18 month rolling basis (see clause 65.8). At clause 65.23 it is noted this requirement may be prohibitively expensive – JHI NV agrees.

(ii) That a scheme appointed actuary would determine the dividend payable (see clause 65.9).

(iii) The proposals in paragraph (i) and (ii) seem to assume that Prospective Claimants on becoming an Entitled Claimant in a subsequent scheme would not result in a reduction of a dividend previously paid but if a surplus emerged there is a possible provision of an additional dividend for prior Claimants. This appears to be a cumbersome process and may not give rise to an equitable distribution. It is also unclear how and to what extent the actuary would take into account Prospective Claimants in respect of the dividend proposal.

(iv) Issues in relation to the approval of the scheme and voting entitlements are discussed at clauses 65.11 and following. It is suggested that legislation could resolve these difficulties and in particular a special committee could be established to vote on the scheme.

Again this appears to be a cumbersome proposal and it would be preferable for a scheme approved by Parliament without the need for a formal voting procedure which will inevitably involve significant conflicts of interest between various classes of Claimants including many who are unknown. There does not appear to be a practical way to resolve that problem other than through Parliamentary action. However, as noted in the JHI NV Submission, the Minister and/or the Scheme Regulator could establish an advisory committee consisting of stakeholder representatives to provide advice on the ongoing operation of the scheme and in relation to its establishment.

(v) At clauses 65.16 and 65.17 discussion of explanatory statements and notices of scheme meetings are set out.

This is resolved by the type of scheme proposed by JHI NV.

(vi) It is proposed that there be a scheme administrator or manager.

This is in line with JHI NV's proposal for a regulatory authority to be responsible for the operation of management and administration of the scheme.

(vii) The role of the court in a supervisory function is discussed at 65.19 and following.

In JHI NV's view, the Court's role can be minimised and therefore legal costs reduced by the establishment of a scheme with an appropriate regulatory authority managing and administering it. The scheme could incorporate appropriate dispute resolution arrangements and in order to minimise costs could preclude or limit appeal rights. Alternatively, the scheme could provide if thought necessary, ultimate rights to approach a court for a final determination.

(viii) At clause 65.28 it is stated that the purpose of the scheme would be to prevent present Claimants being preferred over the interests of future Claimants.

It is suggested that a scheme will not necessarily provide a perfect result. However, a scheme of the type proposed by JHI NV where there is contribution by JHI NV, without admission of liability, will provide a better outcome for all Claimants (such an approval avoids the need for the pursuit of protracted and complex legal claims which in JHI NV's submission will all fail in any event).

(b) Other special purpose legislation

Declaration of Rights

At clause 66.2 of the MRCF Submission it is proposed that one option will be for the Commissioner to recommend that the NSW Government pass legislation declaring various rights as a result of its findings. It then explores various types of such a declaration and the legislative power for that purpose.

At clause 66.7 it is more particularly proposed that the Commissioner could be appointed an acting judge of the Supreme Court, that legislation could provide that the Commission could hear any application by the parties authorised to appear before the Commission and the Commissioner could use evidence already given before him in determining those applications.

Then at clause 66.8 various possibilities are set out for such legislation to assist any litigation following the Commission. This is further elaborated upon in clauses 66.10 through to 66.14.

This is discussed at 6.1 above. For these reasons JHI NV's view is that such an approach is unnecessary if a scheme of the type which JHI NV has recommended is accepted and recommended by the Commission. The agreement by JHI NV to contribute, without admission of liability, resolves the complex issues that may arise out of the proposals that are put by the MRCF.

(c) Proposed Law Reform

Under this heading, the following proposals are put forward in paragraph 67:

- the adoption of the US Doctrine of Under Capitalisation as suggested by Professor Ian Ramsay (see paragraph 67.1(a));

- the enactment of legislation that imposes tort liability on parent companies of corporate groups (see paragraph 67.1(b));
- legislation of the type proposed by the Australian Plaintiff Lawyers Association (we discuss this further below) (see paragraph 67.1(c)).

The MRCF Submission then discusses reforms of the type found in Chapter 11 of Title 11 (Bankruptcy) of the United States Code.

This is dealt with in Section 4, 5.3.2, 5.5 and at 8.2 below.

8.2 The APLA Submission

(a) The discussion of legal principle

The APLA Submission sets out a review of case law relating to the possibility that a holding company may be liable in relation to products manufactured and distributed by its subsidiary. The cases establish principles that depend on the facts and circumstances for a liability arising from either:

- the fact that there is a separate duty of care owed by the holding company to the claimant; or
- that the holding company may be liable vicariously as a principal of the subsidiary being its agent.

The review of the cases point out that in key decisions involving James Hardie & Co Pty Limited (ABN 60) that such arguments have not succeeded[11].

It is not suggested that there is any new or additional or other evidence which would result in those arguments now succeeding other than the possibility that after carrying out further extensive enquiries, information might be disclosed which could suggest that an argument may be able to be put to create a liability on the part of ABN 60. Based on that doubt, it is then suggested that legislation with very far reaching consequences should be recommended by the Commission. There is no basis for the general proposition that ABN 60 is liable in relation to a wide ranging group of claims.

The argument then proceeds, as a moral argument of culpability and not a legal argument.

In relation to the moral argument, JHI NV has in its submission indicated (without admission of liability) that:

> "In the context of the Company's submission to the Special Commission of Inquiry into the Medical Research and Compensation Foundation on Wednesday 14 July 2004:
>
> Directors would recommend that shareholders approve the provision of additional funding to enable an effective statutory scheme to be

[11] See particularly *James Hardie & Co. Pty Ltd v Putt* (1998) 43 NSWLR 554.

established to compensate all future claimants for asbestos-related injuries caused by former James Hardie subsidiary companies".

(b) Legislative Reform

The Legislative Reform proposed by the APLA Submission is wide-ranging and very uncertain as to its consequences.

It is stated that there is some precedent through the operation of section 601AG of the Corporations Act which allows direct access to insurance policies by creditors. It should be noted that in fact this provision only operates where a company has been deregistered.

The proposed legislation is set out in clause 5.2 and the essence of it is that where a claimant of a subsidiary was unable to recover then it could recover those damages from a parent or from any successor of the parent company. A parent company is widely defined as being one holding or which has held more than 50% of the issued shares of the subsidiary and a successor company is also very widely defined.

Such a provision incorporated into the Corporations Act would have wide-ranging implications for commerce within Australia.

It provides an open-ended liability for parents and past-parents and successor companies. The APLA proposal would create significant impediments in relation to the operation and sale of businesses within Australia. It would have significant economic impact on Australian commerce and would no doubt lead to significant issues for banks and other lenders dealing with corporate groups as well as to investors and shareholders.

Such a radical proposal is unnecessary having regard to the proposal put forward by JHI NV and, in any event, could only be contemplated after extensive public enquiry.

(c) Legal Costs

The thrust of this submission is that the significant amount of legal costs arising from litigation is in fact caused by the defendant rather than the plaintiff. Clearly, legal costs will be incurred where litigation arises and particularly where it is defended. As to whether a particular party is the cause of those legal costs being incurred is a matter which will vary from matter to matter. No generalisation can be made from specific examples.

The simple point to be made is that in the KPMG Report it was found that some 27% of costs ($432 million) related to legal costs. Clearly there is a strong incentive as part of an overall resolution of the matters being considered by the Commission of Inquiry to reduce those legal costs. If this can be achieved it will provide greater certainty and better outcomes for Claimants.

(d) Comments upon a Scheme

In the conclusion in section 7 of the APLA Submission, reference is made to a scheme proposed by Allianz Insurance. It is said that the scheme is self-interested

and is based on erroneous factual and legal assumptions and is misleading and tendentious. However, no facts or materials are set out to support these observations. This scheme proposal is not before the Commission. The JHI NV proposal would wish to ensure that benefits were delivered speedily and in a fashion which was more certain than the current uncertainties of common law proceedings.

8.3 The Law Council Submission

(a) A Nominal Defendant Arrangement

The Law Council of Australia proposes that there be State legislation to establish a nominal defendant to deal with claims to compensation relating to asbestos that would have been made against a Group Company. It would be a statutory office funded by levies on relevant parties. It is proposed that the levies would be on insurance policies such as workers compensation, occupiers liability and contractors all risk and like policies throughout Australia. In other words, it would be funded by the taxing system on future premiums paid by the Australian public on particular classes of insurance. This is similar to the funding mechanism used for the Dust Diseases Board.

JHI NV's proposal does not contemplate awards to Claimants being funded by taxpayers. However, the proposal of the Law Council is, apart from the funding issue, substantially in line with JHI NV's proposal for the establishment of a State based scheme operated by an independent regulatory body.

(b) Amendments to the Corporation Act to Facilitate Prospective Claimants in a Liquidation

This proposal is not developed in the LCA Submission. It does not in JHI NV's view provide an adequate solution to the problems which are the subject of the Inquiry.

The LCA Submission deals more extensively with unascertained future claims but makes the important observation that the law cannot conjure up money which would not otherwise be available for claims.

This proposal would raise many of the difficulties identified under the heading "Could the Corporations Act be amended to resolve these problems?" on page 20 of the JHI NV Submission. There also appears to be no basis for the Law Council's submission that administrations could still be resolved in a relatively short time frame (say six years) (see page 7 of the LCA Submission). Even if that were correct such a period is a very lengthy one in the context of external administration.

(c) Lifting the Corporate Veil

The Law Council states that it does not believe that permitting the lifting of the corporate veil is an appropriate response to the issues raised by the Inquiry. This comment is made particularly having regard to the uncertainty and risk of Claimants successfully recovering compensation against companies outside of the Australian jurisdiction.

JHI NV agrees with this proposition but not necessarily for the particular reasons which the Law Council have identified. This matter is discussed further in section 5.3 above.

(d) Chapter 11

The Law Council indicates that it does not believe that Corporations Act reforms along the lines of the US Chapter 11 are desirable, either generally or in relation to MRCF or asbestos claims. JHI NV agrees with this conclusion.

(e) Section 596AB of the Corporations Act

The Law Council suggests this provision should be extended to situations where there are entitlements of future unascertained Claimants. Insofar as this is a matter for general future law reform, we make no comment but we do not believe that it is appropriate that such changes be made to have retrospective operation.

8.4 The Union Submission

(a) Terms of Reference

It is stated that statutory schemes and tort reform do not form any part of the terms of reference of the Commission. JHI NV does not agree with that in the context of recommending possible ways of dealing with the inadequacies of the Corporations Act. JHI NV is not proposing generalised tort law reform, although if a scheme is adopted the principles of that scheme could form the basis of tort law reform. What JHI NV is proposing is a statutory scheme in circumstances where the insolvency provisions of the Corporations Act arguably are inadequate to deal with the current position of the MRCF.

(b) US Chapter 11

This recommendation is addressed in 4 above.

(c) Assertions of Fraud and Other Serious Wrongdoing

In paragraphs 11.3 to 11.5, serious allegations are made in the Union Submission. There is no basis for these allegations and the matters are dealt with in the submissions in reply in relation to Terms of Reference 2 and 3.

To the extent that the Union's views are based on the allegations they make, they should be rejected.

To the extent that these views are repeated in the body of the Union Submission as a basis for recommending change, they should similarly be rejected.

As a general observation, JHI NV believes that the proposal of JHI NV in JHI NV's Submission on Terms of Reference 4 provides a mechanism which in an effective fashion addresses the underlying concerns of the Union Submission in respect of Entitled and Prospective Claimants. The JHI NV proposal deals with particular issues raised by the Union Submission such as the need for an independent regulatory body to operate the scheme.

(d) Current Provisions of the Corporations Law

The Union Submission identifies a number of the difficulties relating to the application of the current provisions and external administration under the Corporations Law.

(e) Lifting the Corporate Veil

JHI NV deals with the general issues relating to lifting the corporate veil in 5.3 above. The Union Submission proposes at clause 11.42 that the legislature should lift the corporate veil making JHI NV liable. This involves not only the lifting of the corporate veil but effectively retrospective legislation and the imposition of a liability on a company which was not in existence at the time of the relevant alleged wrongs.

As a general matter, JHI NV agrees with the view that the proposal to lift the corporate veil should be rejected and in particular, submits that the proposal put by JHI NV removes any justification for this step.

(f) Specific Legislative Reform

This proposal is addressed in 5.4 above.

The proposed reforms would appear to do nothing more than request a statutory statement of conclusions which the Union Submission advocates. JHI NV strongly opposes such an approach.

(g) Suspension from the ASX

The Union Submission at paragraph 11.53 and following proposes that the Commission should make particular findings in relation to various parties and as a consequence recommends the suspension of JHI NV from the ASX. As already noted JHI NV's views in relation to these submissions are largely dealt with in other parts of the JHI NV submission. It is unclear however, how a delisting or suspension of quotation of JHI NV's shares performs any useful role other than punishing Australian shareholders. Such a proposal is totally unprecedented, unwarranted, unnecessary and would be ineffective.

(h) Reform of the Statute of Limitations

As JHI NV understands, most statutes of limitations provide for extensions of time when there is a proper basis for such an extension. JHI NV does not believe that there is any basis for such a wide ranging proposal as is put in paragraphs 11.57 and following to allow proceedings to be brought against the parties specified in paragraph 11.64 in total disregard of any limitation period.

8.5 Counsel Assisting Submission – the Chapter 11 solution

(a) Corporations Act

JHI NV has already commented upon the views of the Counsel Assisting regarding the application of the Corporations Act in 4 above. The problems identified in relation to the Corporations Act are not significantly different from the issues that JHI NV raised in the JHI NV Submission on terms of Reference 4.

(b) Considerations for Reform

In paragraphs 6 to 9 of the Counsel Assisting Submission, Counsel Assisting identifies certain principles which may be relevant to the establishment of a special scheme. JHI NV agrees that those Claimants who are unable to prove in an external administration, together with other Claimants, should receive fair and equitable compensation. Some of the propositions put forward by Counsel Assisting may be more important in terms of long term reform of the law insofar as it deals with Claimants whose claims are dependent upon tort but the practical and pragmatic considerations that need to be considered by the Commission are more appropriately focused on the particular circumstances referred to. JHI NV has proposed in its submission a solution to these difficulties.

(c) Chapter 11 US Bankruptcy Code

As stated in 4 above JHI NV does not believe that Chapter 11 and US Bankruptcy Code provides a solution in the current circumstances but some elements of that code do identify the types of issues that may need to be dealt with in the establishment of an appropriate scheme. For example, the experiences of trust arrangements established in the United States of America discussed at paragraph 16 through to 19 of Counsel Assisting's Submission may be relevant in terms of finalising the design of an appropriate scheme.

It is particularly informative to note the information set out in paragraphs 20 to 27 of the Counsel Assisting Submission and the level of bankruptcies arising from asbestos related claims. Presumably in each case well less than 100 cents in the dollar is being paid to Claimants. In fact, JHI NV understands that the Johns-Manville Trust is only paying US 5 cents in the dollar.

JHI NV notes the comments made in other paragraphs of Counsel Assisting's Submission discussing the Chapter 11 process and in respect of the comments made at paragraph 34 JHI NV notes that it is not suggesting a private resolution of asbestos issues but rather a legislatively based scheme managed and operated by an independent authority.

(d) Other legislative resolutions

The information contained in paragraphs 35 to 39 of Counsel Assisting's Submission in relation to the resolutions of these problems in other parts of the world is instructive and in the view of JHI NV provides strong support for the solution which it has proposed.

(e) Recommendation

At paragraph 40 the Counsel Assisting Submission suggests that further consideration be given to the introduction of mechanisms based on US Chapter 11 processes. JHI NV believes that the Commission should recommend a scheme of the style and type proposed by JHI NV in its submission as it best meets the interests of Claimants.

9. The superiority of the Scheme Proposed by JHI NV

JHI NV's response to the proposals that have been put forward in the Submissions is that the scheme proposed by JHI NV in the JHI NV Submission provides an appropriate method of giving all Claimants a fair and equitable resolution of their claims. It does not carry the legal difficulties which would be associated with legislative responses changing past rights which, if implemented, are likely to be vigorously disputed. It does not require legislation by the Commonwealth Parliament and can be put into effect by the New South Wales Parliament in a short time frame following a recommendation by the Commission that this is the most appropriate way for the Government to respond.

On Wednesday, 14 July 2004, the board of JHI NV resolved that:

> "In the context of the Company's submission to the Special Commission of Inquiry into the Medical Research and Compensation Foundation on Wednesday 14 July 2004:
>
> Directors would recommend that shareholders approve the provision of additional funding to enable an effective statutory scheme to be established to compensate all future claimants for asbestos-related injuries caused by former James Hardie subsidiary companies".

Annexure A

James Hardie Industries N.V.

Comparative Assessment of Likely Effectiveness of "Solutions" Proposed in Response to Term of Reference 4

	Assuring, Fair and Equitable Compensation for all Claimants • **Overarching need**	**Assuring Additional Funding for Claimants** • **Fundamental driver for solution**	**Assuring Timely Determination and Payment of Compensation to Claimants** • **Optimal approach to meeting Claimants' needs**	**Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims** • **No added financial burden on taxpayer**	**Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales** • **No adverse or unintended consequences**
JHI NV	**YES:** All Claimants would: (1) be covered (even currently unknown Claimants); and (2) receive compensation not skewed to early Claimants and without cost or uncertainty of litigation.	**YES:** Opportunity for substantial additional funding created by: (1) streamlining costs (legal/administrative); (2) limiting legal actions outside scheme; (3) certainty as to amount of contribution; and (4) minimising superimposed and/or	**YES:** Scheme provides for: (1) streamlined entitlement determination; (2) efficient administrative process; (3) defined payments based on objective medical and other	**YES:** Scheme designed and funded to provide fair and equitable compensation to Claimants in accordance with its terms.	**YES:** Proposal does not result in broad or expansive amendments to Corporations Act or limited liability doctrine or result in creating obstacles to business and investment in Australia (and in particular in New South Wales).

	Assuring, Fair and Equitable Compensation for all Claimants	Assuring Additional Funding for Claimants	Assuring Timely Determination and Payment of Compensation to Claimants	Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims	Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales
		judicial inflation.	criteria; and (4) timely implementation because there are no anticipated legal challenges to suggested statutory scheme.		
Counsel Assisting	**NO:** Chapter 11-like reform would not result in fair and equitable compensation of Claimants absent voluntary contribution of additional funding; suggestion of statutory lifting of limited liability does not deal with significant risk that Claimants will not receive fair and equitable compensation due to contested litigation	**NO:** Chapter 11 like reform alone does not create obligation for additional funding. Removing limited liability does not deal with significant risk that additional resources will not be available due to contested litigation process, including political, legal, constitutional, and practical uncertainties, especially potential	**NO:** Suggested solution establishes new threshold obstacles to Claimants' recoveries due to contested litigation process, including risk of unenforceability of new statutory provision. In addition, full litigation of claims still required to establish entitlement to, and amount of, payments.	**NO:** Issue not addressed and no assurance that Claimants will be satisfied other than by recourse to taxpayer funded government programs.	**NO:** Expressed concern that reform of the limited liability doctrine would create uncertainty for businesses within Australia (and in particular in New South Wales) and make Australia (and in particular in New South Wales) a less attractive place in which to do business.

	Assuring, Fair and Equitable Compensation for all Claimants	Assuring Additional Funding for Claimants	Assuring Timely Determination and Payment of Compensation to Claimants	Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims	Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales
	process, including political, legal, constitutional, and practical uncertainties, especially potential unenforceability of statutory provisions (Australia) and/or remedies (foreign jurisdictions).	unenforceability of statutory provisions (Australia) and/or remedies (foreign jurisdictions).			
MRCF	**NO:** Suggestion of a scheme of arrangement and/or statutory lifting of limited liability does not deal with significant risk that Claimants will not receive fair and equitable compensation due to contested litigation process, including political, legal, constitutional, and	**NO:** Removing limited liability does not deal with significant risk that additional resources will not be available due to contested litigation process, including political, legal, constitutional, and practical uncertainties, especially potential unenforceability of	**NO:** Suggested solution establishes new threshold obstacles to Claimants' recoveries due to contested litigation process, including risk of unenforceability of new statutory provision. In addition, full litigation of claims still required to establish entitlement to,	**NO:** Issue not addressed and no assurance that Claimants will be satisfied other than by recourse to taxpayer funded government programs.	**NO:** Expressed concern that reform of limited liability doctrine would create uncertainty for businesses within Australia (and in particular in New South Wales) and make Australia (and in particular in New South Wales) a less attractive place in which to do

	Assuring, Fair and Equitable Compensation for all Claimants	Assuring Additional Funding for Claimants	Assuring Timely Determination and Payment of Compensation to Claimants	Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims	Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales
	practical uncertainties, especially potential unenforceability of statutory provisions (Australia) and/or remedies (foreign jurisdictions).	statutory provisions (Australia) and/or remedies (foreign jurisdictions).	and amount of, payments.		business. Similar concern could be raised with suggested procedural and evidentiary reforms.
Unions/ Asbestos Support Groups	**NO:** Statutory lifting of limited liability does not deal with significant risk that Claimants will not receive fair and equitable compensation due to contested litigation process, including political, legal, constitutional, and practical uncertainties, especially potential unenforceability of statutory provisions (Australia) and/or	**NO:** Removing limited liability does not deal with significant risk that additional resources will not be available due to contested litigation process, including political, legal, constitutional, and practical uncertainties, especially potential unenforceability of statutory provisions (Australia) and/or remedies (foreign	**NO:** Suggested solution establishes new threshold obstacles to Claimants' recoveries due to contested litigation process, including risk of unenforceability of new statutory provision. In addition, full litigation of claims still required to establish entitlement to, and amount of, payments.	**NO:** Issue not addressed and no assurance that Claimants will be satisfied other than by recourse to taxpayer funded government programs.	**NO:** Expressed concern that reform of the limited liability doctrine would create uncertainty for businesses within Australia (and in particular in New South Wales) and make Australia (and in particular in New South Wales) a less attractive place in which to do business.

	Assuring, Fair and Equitable Compensation for all Claimants	Assuring Additional Funding for Claimants	Assuring Timely Determination and Payment of Compensation to Claimants	Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims	Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales
	remedies (foreign jurisdictions). Further, continued litigation by Claimants and eliminating or lowering of some procedural barriers to claimant litigation does not ensure fair and equitable compensation to any Claimants nor as between Claimants.	jurisdictions).			

	Assuring, Fair and Equitable Compensation for all Claimants	Assuring Additional Funding for Claimants	Assuring Timely Determination and Payment of Compensation to Claimants	Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims	Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales
LCA	**PERHAPS:** Suggestion of a nominal defendant funded by insurance levies depending upon the size of levy may result in fair and equitable compensation of Claimants. However such a proposal is unlikely to find favour with the insurance industry. **NO:** Suggestion of a quasi-judicial tribunal to assess unascertained future claims absent voluntary contribution of additional funding would not result in fair and equitable compensation of Entitled and	**PERHAPS:** Suggestion of a nominal defendant funded by insurance levies may result in additional funding. However, such a proposal is unlikely to find favour with the insurance industry and imposes the funding of Claimants on insurers and New South Wales taxpayers. **NO:** Proposal for a quasi-judicial tribunal will not result in additional funding. **NO:** Proposed amendment to s596AB is not intended to be	**NO:** Proposed nominal defendant would not provide for the benefits provided by the JHI NV proposal. **NO:** Proposal for a quasi-judicial tribunal does not identify how that tribunal would adjudicate. **NO:** Proposed amendments to s596AB not intended to be retrospective. Even if they were they would establish new threshold obstacles to Claimants' recoveries due to contested litigation process, including risk of unenforceability of new	**NO:** Issue not addressed and no assurance that Claimants will be satisfied other than by recourse to taxpayer funded government programs.	**NO:** If the nominal defendant proposal was introduced it would create obstacles to business and investment in Australia (and in particular in New South Wales), including by increasing insurance premiums in New South Wales and discouraging business from adequately insuring and from undertaking business in New South Wales. **NO:** Proposal for a quasi-judicial tribunal to assess unascertained future claims is likely to result in very protracted

	Assuring, Fair and Equitable Compensation for all Claimants	Assuring Additional Funding for Claimants	Assuring Timely Determination and Payment of Compensation to Claimants	Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims	Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales
	Prospective Claimants. **NO:** Proposed amendment to s596AB does not deal with significant risk that Entitled and Prospective Claimants will not receive fair and equitable compensation due to contested litigation process, including political, legal, constitutional, and practical uncertainties, especially potential unenforceability of statutory provisions (Australia) and/or remedies (foreign jurisdictions).	retrospective. Even if it were it would not deal with significant risk that additional resources will not be available due to contested process, including political, legal, constitutional, and practical uncertainties, especially potential unenforceability of statutory provisions (Australia) and/or remedies (foreign jurisdictions).	statutory provision. In addition, full litigation of claims still required to establish entitlement to, and amount of, payments.		external administrations. There appears to be no basis for the ascertain that such administrations could be resulted within a relatively short time frame **NO:** Proposed amendment to s596AB would create uncertainty for businesses within Australia (and in particular in New South Wales) and make Australia (and in particular in New South Wales) a less attractive place in which to do business.

	Assuring, Fair and Equitable Compensation for all Claimants	Assuring Additional Funding for Claimants	Assuring Timely Determination and Payment of Compensation to Claimants	Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims	Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales
	Further, continued litigation by Claimants does not ensure fair and equitable compensation to any Claimants nor as between Claimants.				
APLA	**NO:** Statutory lifting of limited liability does not deal with significant risk that Claimants will not receive fair and equitable compensation due to contested litigation process, including political, legal, constitutional, and practical uncertainties, especially potential unenforceability of statutory provisions (Australia) and/or	**NO:** Removing limited liability does not deal with significant risk that additional resources will not be available due to contested litigation process, including political, legal, constitutional, and practical uncertainties, especially potential unenforceability of statutory provisions (Australia) and/or remedies (foreign	**NO:** Suggested solution establishes new threshold obstacles to Claimants' recoveries due to contested litigation process, including risk of unenforceability of new statutory provision. In addition, full litigation of claims still required to establish entitlement to, and amount of, payments.	**NO:** Issue not addressed and no assurance that Claimants will be satisfied other than by recourse to taxpayer funded government programs.	**NO:** Expressed concern that reform of the limited liability doctrine would create uncertainty for businesses within Australia (and in particular in New South Wales) and make Australia (and in particular in New South Wales) a less attractive place in which to do business.

	Assuring, Fair and Equitable Compensation for all Claimants	Assuring Additional Funding for Claimants	Assuring Timely Determination and Payment of Compensation to Claimants	Avoiding Recourse of Claimants to taxpayer funded Government Programs to Fund their Claims	Avoiding Disincentives to Business and Investment in Australia and, in particular, in New South Wales
	remedies (foreign jurisdictions). Further, continued litigation by Claimants and eliminating or lowering of some procedural barriers to claimant litigation does not ensure fair and equitable compensation to any Claimants nor as between Claimants.	jurisdictions).			

Annexure B

1. International Issues

The difficulties associated with proposals which require assistance from foreign courts need to be contrasted with the short and long term certainty of a proposal which is wholly within the powers of the NSW legislature.

1.1 Enforcement Issues in the United States and The Netherlands

As acknowledged in other Submissions it is highly likely that any legislation could result in protracted litigation in foreign courts. There can be little doubt that such litigation would involve a significant amount of time, energy and expense on the part of all participants. These expenditures are magnified given that parties, documents and witnesses are on three continents and would diminish the resources available to asbestos Claimants.

As noted in the other submissions, significant hurdles exist to enforcing Australian judgments against JHI NV's assets outside of Australia. These hurdles to enforcement include both (i) procedural hurdles, and (ii) hurdles involving substantive issues of law.

1.2 Procedural Hurdles In Enforcing Judgments in the United States

As a procedural matter, in order to enforce a judgment in the United States, one would first have to obtain a final and conclusive judgment in Australia against JHI NV. This presumes that the legislature in NSW enacts legislation effectively establishing JHI NV's liability for asbestos-related claims that survive constitutional and other legal challenges.

Upon obtaining a final judgment against JHI NV in Australia, an action would have to be commenced in an appropriate jurisdiction seeking to enforce that judgment, and one would expect JHI NV could assert in the United States proceedings any defences it may have to the enforcement of the judgment. The directors of JHI NV may be compelled to pursue any such litigation in the United States until all appeals are exhausted. Thus, the procedural process of obtaining a judgment in the United States – aside from any consideration of substantive issues regarding the likelihood of success of any such enforcement action – may take several years, first in the Australian court system, followed by several years of litigation in the United States court system.

Issues of directors' duties particularly under foreign law will be critical to the decisions of JHI NV should it be faced with such litigation.

1.3 Substantive Hurdles Involved in Enforcing Judgments in the United States

In addition to procedural hurdles, one seeking to enforce an Australian judgment would need to deal with a host of substantive legal challenges to enforcement. We note that the United States is not a party to a treaty with Australia governing the reciprocal

recognition of court judgments. Generally, principles of comity will guide a U.S. court in determining whether or not to enforce a judgment of a foreign court.

A degree of uncertainty is inherent in the principles of comity. As the United States Supreme Court stated in the landmark case, *Hilton v. Guyot*, 159 U.S. 113, 164-65, (1895) "comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule . . ." Thus, as a general matter, even if challenges to any legislative scheme were ultimately upheld in the Australian court system, there can be no certainty that such judgments will be respected and enforced in the United States.

While the question of enforcing a foreign judgment is often a question of state law, and while United States courts generally favour enforcing foreign judgments under appropriate circumstances and will not relitigate matters, there are well-recognised circumstances in which a United States court may not enforce a foreign judgment. These factors may include findings that:

- the foreign judicial proceedings were unfair or biased;
- the foreign court lacked personal jurisdiction over the defendant;
- the foreign court lacked subject matter jurisdiction over the dispute;
- there was a showing of fraud or other irregularity in the foreign proceedings; or
- the foreign cause of action or judgment violates a U.S. public policy.

Various proposals raised in the Submissions present serious constitutional and legal issues that could trouble a U.S. court in an enforcement context. Examples of these issues are discussed below.

1.4 Veil-Piercing Issues Present Hurdles To Enforcement

Various submissions convey a desire to pierce the corporate veil, in some instances as part of general reforms, and, in other instances, in a manner specifically targeting JHI NV. Veil-piercing in the United States, as it is in Australia, is generally disfavoured. One may obtain a sense of the level of disfavour by examining the law of Delaware on this topic as Delaware law is often looked to for guidance by other courts nationwide in the United States in evaluating complex corporate issues.[12]

Historically, Delaware courts have rarely pierced the corporate veil. See e.g. *Terry Apts. Assocs. v. Associated-East Mortgage Co*., 373 A.2d 585, 588 (Del. Ch. 1977), *aff'd*. *mem*., 385 A.2d 146 (Del. 1978); "It was and is the general rule that a corporation is treated as an independent legal entity, with an identity separate and apart from its stockholders and from its officers or directors, even where it is a wholly-owned subsidiary of another corporation, and even where its officers or directors are the same persons

[12] See e.g., *United Artists Theatre Co. v. Walton, 3l5 F.3d 217, 230 (3d Cir. 2003) ('[w]e look to Delaware corporate law as a guide because it offers time-tested insights on how courts should best evaluate an issue …")*

who hold those offices in the parent company." D. Drexler, L. Black & A.G. Sparks III, *Delaware Corporation Law and Practice* § 8.02 at 8-5 (2003).

Generally, the only exceptions under Delaware law are where there is fraud, or where a sole stockholder has either disregarded a subsidiary's separate corporate form or treated the corporation as a mere 'instrumentality' or extension of himself or itself. Id. See, e.g., *Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 151 A.2d 125 (Del. Ch.), aff'd, 154 A.2d 684 (Del. 1959) (court refused, for purposes of attachment, to treat shares of a Delaware corporation owned by a wholly-owned Canadian subsidiary of a German parent as the property of the parent and thus, the court below properly vacated the seizure of shares).[13]

Paragraph 6.1(a) of Counsel Assisting's Submission, contends that the corporate veil doctrine, as recognised in the United States, is mitigated in many cases by doctrines unknown to Australian law (eg the "successor liability doctrine"). However, the imposition of corporate liability based on these theories is limited and strictly construed, and the underlying basis of these principles is distinct from the concept of piercing the corporate veil. To the extent a judgment of an Australian court upholds a scheme based upon law that differs widely from the law in the U.S., a U.S. court could hesitate to enforce it.

1.5 Retrospectivity Of Any Proposal May Present Bases For Enforcement Challenges

The retrospectivity of the various proposed schemes poses public policy issues and issues of enforceability under U.S. law. While there is precedent for the imposition of legislation in the U.S. which is retrospective in effect, generally such legislation tends to be confined to the short and limited periods required by the practicalities of producing national legislation. On the other hand, legislation that imposes severe retrospective liability on a limited class of parties raises serious issues of fairness and due process. See, e.g., *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998) (striking down as unconstitutional federal legislation imposing severe retrospective liability on a limited class of companies in connection with funding certain benefits of miners). There is precedent for U.S. courts not to enforce foreign judgments that impose severe retrospective penalties. See, e.g., *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1190 (N.D. Cal. 2001) (refusing to enforce a French judgment that was inconsistent with the First Amendment's protection of free speech and noting also as an objectionable feature that "[t]he French order permits *retrospective* penalties.") (emphasis in original). Many of the proposed legislative schemes and arrangements in the submissions fall squarely outside of the type of limited retrospective legislation typically enforced in the U.S.

[13] James Hardie Building Products, Inc. is a Nevada corporation. Nevada has a narrow veil-piercing statute based upon the alter-ego theory. See Nev. Rev. Stat. 78.747 (2003)(providing, in relevant part, that "[e]xcept as otherwise provided by specific statute, no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation."). Although Nevada case law on veil-piercing is limited, the courts in Nevada, as in Delaware, seem to disfavour veil-piercing and apply the concept narrowly.

1.6 Many features of the MRCF's proposal raise serious Constitutional and public Policy concerns in the United States

The MRCF Submission contains a number of suggestions designed ostensibly to avoid "lengthy litigation." However, similar to the concerns expressed in relation to Australian enforceability issues, many of the suggestions could raise serious constitutional and public policy issues in U.S. courts, including recommendations to:

(a) appoint the Commissioner as an acting judge of the Supreme Court of NSW;

(b) use evidence and findings from the Commission in subsequent proceedings;

(c) release confidentiality and privilege constraints; and

(d) reverse burdens of proof.

If an Australian court were to sanction such proposals, U.S. courts could decline to enforce a judgment against JHI NV as contrary to American public policy.

While United States courts generally do not re-examine judgments of foreign courts under standards of United States law, United States courts nevertheless will decline to enforce judgments where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought. See e.g. *In Bachchan v. India Abroad Publications, Inc*., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

1.7 Procedural Hurdles Involved in Enforcing an Australian Judgment in The Netherlands

The Submission by Counsel Assisting also raises issues of the enforceability of a judgment against JHI NV in The Netherlands.

The procedural hurdles in enforcing an Australian judgment in The Netherlands are similar to the hurdles in enforcing such judgment in the United States. While there are no statutory requirements, generally one must obtain a final and conclusive judgment in Australia before an enforcement action in The Netherlands would be considered.

1.8 Substantive Hurdles Involved in Enforcing an Australian Judgment in The Netherlands.

The various proposals included in the Submissions raise significant issues in relation to Dutch public policy considerations. Furthermore, such concerns would be heightened in instances where the proposed legislation would not be of general applicability but, rather would be targeted specifically at JHI NV.

There is no treaty between The Netherlands and Australia governing the reciprocal recognition of court judgments. The regime of judicial decisions originating from countries with which no treaty exists is governed by article 431 Dutch Code of Civil Procedure ("DCCP"). Article 431 DCCP provides that no decision rendered by foreign judges issued abroad can be enforced within The Netherlands without being re-litigated before a Dutch Court.

Nevertheless, if the matter is brought before a Dutch Court, the Court may determine that such judgment can be recognised without full re-litigation if the following minimum requirements are met:

(a) internationally acceptable jurisdiction of the Court of origin;

(b) no infringement of due process; and

(c) no infringement of Dutch public policy.

In principle, Dutch courts do not recognise decisions based upon laws that touch upon the exercise of the government sovereignty, such as revenue, penal and other public laws or exemplary or punitive damages. If legislation in Australia is enacted to impose liability on JHI NV, and such legislation is found to be in substance a law that enforces Australian public interests or imposes punitive or exemplary damages then recognition of such a judgment could be refused by The Netherlands' courts.

Assuming that the jurisdiction of the Australian Court issuing the judgment is internationally acceptable, and that the proceedings in Australia did not infringe due process, enforceability would turn on considerations of Dutch public policy. In this regard, a Dutch court would not examine whether such judgment was rendered in accordance with Dutch law, but rather, would examine the consequences of such judgment in relation to the underlying policies and principles of the Dutch legal system.

In this respect, one also could argue that the reformation of the Australian legislation is not based on the notion of general interest, but effectively directed at JHI NV. The unfair imbalance between the interests of the Claimants and those of JHI NV thus caused, may well be a reason for the Dutch Courts to hesitate enforcing a judgment based on such legislation.

1.9 Retrospective legislation

The retrospective nature of many of the proposed legislative reforms raise additional concerns as to enforceability in The Netherlands. The General Provisions Act 1829 provides that Dutch law does not have retrospective effect. However, as the law has evolved through judicial interpretation, enforceability of retrospective legislation is not per se illegal, but must be tested against the basic principle of legal certainty to determine whether it will result in unforeseeable disadvantage. Dutch Courts may well decline to enforce a judgment against JHI NV based on retrospective legislation as being contrary to the basic principle of legal certainty, i.e. creating an unforeseeable disadvantage for JHI NV.

1.10 Piercing the corporate veil (and identification)

Under Dutch law, the concept of piercing the corporate veil or identification is generally disfavoured and only accepted in exceptional circumstances. In principle, a company is liable only for its own debts and can be liable for the debts of group companies only in exceptional circumstances, such as express promises, evasion of the law and abuse of company law.

Accordingly, the enforceability of judgments based upon legislative reformation of the corporate veil doctrine in Australia in a manner inconsistent with fundamental principles of Dutch law may well be declined by Dutch Courts on the basis of infringement of Dutch public policy.

1.11 Potentially penal or punitive legislation

The proposed legislation for piercing the corporate veil may be regarded as penal or punitive in nature and for that reason Courts in jurisdictions outside Australia may be reluctant to enforce such a law. This would create a major impediment to the enforcement of any judgment which pierced the corporate veil.