Submission of James Hardie Industries NV and ABN 60 Pty Limited on Term of Reference 4

Special Commission of Inquiry into Medical Research and Compensation Foundation

Term of Reference 4

The adequacy of current arrangements available to MRCF under the Corporations Act to assist MRCF to manage its liabilities, and whether reform is desirable to those arrangements to assist MRCF to manage its obligations to current and future claimants

Synopsis

There are limitations upon the ability of MRCF to manage its obligations to current and future claimants under the Corporations Act. We submit that the establishment of a specially designed statutory scheme under NSW law would be the most effective way to provide for speedy, fair and equitable compensation. The Board of James Hardie Industries NV (***JHI NV***) would recommend shareholders approve the provision of additional funding to such a scheme to enable compensation for all future claimants for asbestos-related injuries caused by former James Hardie subsidiary companies.

Current Arrangements for MRCF and its subsidiaries under the Corporations Act

The Corporations Act currently provides several arrangements to assist a company (or group of companies) which is insolvent, or in some cases where it is likely to become insolvent in the future, to manage its liabilities through external administration, namely (i) voluntary administration followed by a deed of company arrangement, (ii) scheme of arrangement, (iii) provisional liquidation or (iv) winding up. In each event, an external administrator is given control of the company's assets and, if there are to be dispositions of assets, is responsible for the manner of their disposal. The external administrator also is responsible for the determination of creditors' claims and the amount and timing of distributions (if any) to those creditors.

Corporations Act Arrangements are available to MRCF

The two former James Hardie subsidiaries, Amaca and Amaba (now part of MRCF), have substantial liabilities to existing claimants as well as substantial contingent liabilities to prospective claimants relating to the manufacture and distribution of asbestos products. In light of new actuarial advice before the Commission, if each of MRCF and its subsidiaries is not currently insolvent, that is, unable to pay its debts as and when they fall due, each is likely to become so in the future, given the substantial liabilities to existing and contingent claimants. As such, MRCF, Amaca and Amaba could, in theory, avail themselves of the external administration arrangements provided by the Corporations Act.

Corporations Act Arrangements may not be adequate for MRCF

Given the nature of the existing and contingent claimants, the available Corporations Act arrangements must be considered with regard to the manner in which the arrangements can accommodate contingent liabilities emerging over a long period of time which must be met in whole or in part from a finite pool of assets. The arrangements must also achieve an equitable distribution of available assets amongst all such claimants.

In our submission, for an equitable distribution to be achieved:

- to the maximum extent possible over time all claimants, whether they have an existing claim or not, should receive an equitable share of the available funds;
- the available funds should be managed to provide the maximum return to claimants; and
- the amounts payable in respect of a particular claimant should be provided (on a cash basis) as quickly as possible following the incurrence of a recoverable expense or in the case of future loss or damage as soon as the injury and its possible development has stabilised sufficiently or has developed sufficiently to permit assessment of that loss and damage with a reasonable level of certainty.

The issue which arises in the case of MRCF and its subsidiaries is that potential claimants include persons who have been exposed to asbestos but have not, prior to the commencement of any external administration, manifested any symptoms of an asbestos related illness. That manifestation could occur over the next 35 to 40 years.

Creditors who can participate in a distribution under an external administration are defined in the Corporations Act or by judicial authority to be those persons to whom a debt is payable by, or who have a claim against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before, in effect, the external administration commenced. Judicial authority indicates that, in relation to a winding up, a person whose claim is a mere expectancy on the commencement of the external administration may not be entitled to participate in any distribution. On the basis of the winding up cases, it is arguable that a person who has been exposed to asbestos but has not manifested any symptoms of illness has a mere expectancy rather than a future or contingent claim and cannot therefore participate in any external administration.

This view would mean, for example, that, in an external administration of MRCF and its subsidiaries, only those persons who have exhibited symptoms of asbestos related illnesses at the commencement of the external administration would be paid a distribution. A person who exhibited symptoms the day after the commencement would be precluded from participating and would therefore receive no compensation.

This difficulty evidences a potential inadequacy of the Corporations Act. However, in our submission, in an external insolvency administration, potential future asbestos claimants should be contingent creditors of MRCF and its subsidiaries. Furthermore, if potential future asbestos claimants are not contingent creditors, it may be possible in a voluntary administration to utilise the provisions of Part 5.3A of the Corporations Act to overcome this potential inadequacy by court order. As this position is untested, it is attended by uncertainty and may take time and legal costs to resolve.

A Comprehensive Solution for MRCF and Claimants is required

If steps are not taken in the near future to identify a solution to manage the ongoing claims, the assets of MRCF will be depleted as existing claims continue to be met in full or in part and, at some future point in time, MRCF and its subsidiaries will need to be placed in external administration, with the attendant risk of uncertainty and delay.

We submit that a specially designed statutory scheme under NSW law could provide for speedy, fair and predictable payments to all claimants and thus achieve a fair and equitable outcome. Assuming such a scheme could be suitably structured, and subject to shareholder approval, JHINV would be prepared to make contributions to that scheme. The manner in which the scheme would operate and how the contributions by JHINV could be structured is something which can only be determined after consultation.

The Commissioner should therefore, in our submission, make a recommendation that law reform is desirable so as to implement a special statutory scheme of arrangement to deal with the issues confronting MRCF.

Proposed Key Principles for Scheme Structure

In order to achieve the desired outcome, the proposed elements of the statutory scheme include:

- speedy, fair and equitable compensation for all existing and future 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.

Contributions

If an effective compensation scheme can be established consistent with the principles outlined above, the Board of JHI NV will recommend shareholders approve the provision of additional funding to enable compensation for all future claimants for asbestos-related injuries caused by former James Hardie subsidiary companies. To provide confidence that claimants will receive compensation and shareholders will receive appropriate certainty, details of the scheme such as those noted under the Proposed Key Principles for Scheme Structure above would need to be established, so that the scheme could be costed and appropriate contribution structures agreed.

The proposal for JHINV to make contributions to a suitably structured scheme is made without any admission of liability or prejudice to JHINV's rights or defences, but with due regard for the original intention of the Board to fund future claimants through the establishment of MRCF and for the concerns that have been raised with respect to the transactions surrounding the formation of MRCF. The directors of JHINV submit that a comprehensive resolution of the matters currently before the Commission, and the financial difficulties now facing MRCF, is in the best interests of all parties. It will provide greater certainty of equitable compensation to asbestos claimants avoid the time, expense and other negative effects of potential litigation, and hasten the removal of the uncertainty currently surrounding the company's position.

To satisfy legal and corporate governance requirements, contributions by JHINV to a scheme which the directors consider to be suitably structured will be subject to approval of the shareholders of JHINV. Such approval is expected to be by ordinary resolution, that is more than 50% of the votes cast at the meeting where the resolution is put.

Submissions

Current Arrangements under Corporations Act

The Corporations Act currently provides several arrangements to assist a company (or group of companies) which is insolvent, or in some cases where it likely to become insolvent in the future, to manage its liabilities through external administration, namely (i) voluntary administration followed by a deed of company arrangement, (ii) scheme of arrangement, (iii) provisional liquidation or (iv) winding up. In each event, an external administrator is given control of the company's assets and, if there are to be dispositions of assets, is responsible for the manner of their disposal. The external administrator also is responsible for the determination of creditors' claims and the amount and timing of distributions (if any) to those creditors.

Types of External Administrations

(i) Voluntary administration and deed of company arrangement - Pt 5.3A

A voluntary administration has, as its objectives, maximising the chances of the company or as much as possible of its business continuing in existence or, if that is not possible, to provide a better return for the company's creditors and members than would result from an immediate winding up of the company. It enables the company, to enter into a deed of company arrangement which binds the Company, creditors, members and officers. The Deed must be approved by requisite majorities in number (50%) and dollar value (50%) of creditors. It provides the greatest degree of flexibility to the administrator to determine the best way for the company to proceed. The Court plays a key supervisory role.

(ii) Scheme of arrangement - Part 5.1

A scheme of arrangement operates to effect a compromise between the company and its creditors on the basis of an agreed scheme. That scheme must be approved by requisite majorities, in number (75%) and dollar value (50%) of creditors affected and approved by the Court. An administrator is appointed to administer the compromise pursuant to the terms of the scheme.

(iii) Provisional Liquidation - Part 5.4B

A provisional liquidation is, effectively, a means of preventing a company's assets from being dissipated prior to the appointment of a liquidator on the winding up of the company. As such, it does not, of itself, offer a final solution to an insolvent company.

(iv) Winding up/Liquidation - Part 5.4B

A winding up of a company provides an ultimate solution to the company's financial position - the company will cease to exist. On the winding up of the company, the liquidator is required to collect, call in and realise the company's assets and disperse them, first in payment of the company's creditors, having regard to statutory priorities, and, to the extent there are funds remaining, in a return of capital to the company's shareholders. In broad terms, the statutory priorities result in the costs and expenses of the liquidator being met first, followed by specific employee entitlements and then the remaining creditors. Subject to certain exceptions, assets over which a company has granted a security to a

third party are first used to satisfy debts owing to that third party. If there is an excess of liabilities over assets available to meet them, the statutory priorities are paid in full prior to any rateable distribution of the remaining assets amongst the remaining creditors. The liquidator may seek to recover statutory and contractual claims against third parties. However, there will generally be costs and expenses associated with doing so which may reduce the pool of assets available to creditors if the claim is unsuccessful.

Commencement of External Administration

The Corporations Act sets out the date on which each type of administration is deemed, in effect, to commence - the Relevant Date. This Relevant Date is used to determine the rights of creditors in the administration. Appendix A provides details of the Relevant Date for each form of administration.

Application of the Corporations Act for MRCF

MRCF is a company limited by guarantee and holds 100% of the issued share capital of MRCFI and 50% of the issued share capital of Amaca Pty Limited (***Amaca***). MRCFI owns 50% of the issued share capital of Amaca and Amaca in turn owns 100% of the issued share capital of Amaba Pty Limited (***Amaba***). These companies comprise the MRCF Group (each a **Group Company**). Although each Group Company was originally incorporated in New South Wales under the Corporations Law they are now taken to be to be incorporated in *this jurisdiction* (ie Australia[1]) and to be registered in a relevant State or Territory (ie New South Wales).

The Corporations Act is a Commonwealth statute, but a law of the State of New South Wales may impose obligations, or confer rights or powers, on a person by reference to the place of registration of a company.[2] In certain cases, State law may be inconsistent with the Corporations Act and in effect replace all or part of it.[3]

As each Group Company is regulated by the Corporations Act, upon an insolvency Chapter 5 of the Act "External Administration" would apply to that event. Ordinarily, each Group Company would be dealt with separately; however, in some cases a pooling arrangement across a group of companies may be possible.

Characteristics of the Liabilities of the MRCF Group

Amaca and Amaba have:

- substantial liabilities to claimants who can now commence proceedings, referred to in this submission as Entitled Claimants; and
- substantial potential liabilities to claimants who cannot commence proceedings now, referred to as Prospective Claimants,

[1] See sections 5H, 9 and 119A Corporations Act

[2] See note 3 to section 119A Corporations Act and discussion further below on the operation of section 5F and 5G of that Act.

[3] See sections 5D to 5I Corporations Act.

relating to the manufacture and distribution of asbestos products. These claimants are both known and unknown. In addition:

- Certain claimants will be able to make claims in respect of liabilities that are present, future or contingent[4].
- Amaca and Amaba may in the future be liable for possible prospective claims which cannot be the basis of present proceedings and which are best described as mere expectancies. Ordinarily, a claim arising from exposure to asbestos could not be notified or brought against the companies (in tort or under a relevant statute) until or unless a person suffers damage or impairment as a result of an exposure to asbestos[5]. The number of these claimants would appear to be high compared to the present number of notified claims[6]
- The liabilities (and in particular the expectancies) are substantial but they also have high levels of uncertainty and volatility[7].
- The emergence of claims could extend out to 2040[8].

Claimants may also be entitled to bring claims against other persons and Group Companies may have a concurrent liability with those other persons. Typically the persons against whom claims may be brought are employers who have used products manufactured by a Group Company and there may be other manufacturers' products to whom the Claimant may have been exposed.

Claimants who are workers and were exposed to asbestos in the workplace may have entitlements to compensation payments under the Workers Compensation (Dust Diseases) Act 1942 (NSW) (***WCDD Act***) and other workers compensation schemes in other places. In such cases, these schemes may have rights of recovery against a Group Company.

Those who are unable to prove in an external administration of a Group Company or those whose provable claim is reduced by insufficiency of assets will no doubt seek to pursue their claim or seek to recover any deficiency by action against others or by a claim against a liable scheme such as that under the WCDD Act. Rights of contribution or recovery that arise after the Relevant Date will not be provable claims in an external administration of any of the Group Companies[9].

Rights of contribution arising between parties may or may not be exercised or be able to be exercised depending upon the costs and difficulties associated with obtaining contribution, the solvency or status of other parties and the time at which the rights arise.

In addition to the above, claimants may be able to bring claims in different jurisdictions where different procedural rules apply which may impact upon the likelihood of success of the claim and the damages awarded. For example, the Dust Diseases Tribunal of New South Wales (the ***DDT***)

[4] For these purposes these submissions adopt the meaning these terms have in section 553(1) of the Corporations Act.

[5] See the discussion below under the heading "The Characteristics of a Claim in Tort" in relation to this.

[6] See Exhibit 252, section 9.3.1 where future and total notifications are assessed as: mesothelioma 4,374 future and 5,514 total; non-mesothelioma 2,603 future and 3,572 total; workers compensation 926 future and 1,777 total.

[7] See Exhibit 252, section 9.4.2.

[8] See Exhibit 252, 9.3.1 but the finalisation of such claims may extend beyond this date.

[9] See below and the discussion of section 553 of the Corporations Act.

has provisions which may assist claimants in a number of respects including procedural and evidentiary matters (see Appendix B).

Further, there may be differences in the substantive law applicable to a claim depending on the place in which it has arisen. There may be differences as to a claimant's entitlement to compensation under workers compensation or related schemes as well as the differences identified above in relation to tort claims. It may be that in some cases, claims can be brought in overseas jurisdictions and then questions will arise as to the extent to which judgments obtained in those overseas jurisdictions can be enforced in Australia and more particularly in New South Wales.

In some cases, claimants may have received or be seeking provisional damages which may be awarded by the DDT where there is a potential for further impairment to arise.[10] In these cases, if that further impairment develops they may revisit their claim.

Characteristics of the Assets of the MRCF Group

Regardless of the basis or nature of the claim against Amaca or Amaba, the only assets available to fund the claim payments are the assets available to those companies.

The assets available to the Group Companies consist of investments and rights of recovery against other persons, including insurers.

Rights of recovery against insurers may depend in part on what claims are in fact brought against the companies, whether or not policies respond to those claims and whether the insurers are entitled to deny liability. The rights of recovery may be constrained by limits within the policies.

Rights of contribution and other rights of recovery will be constrained by the costs of exercising those rights and the likelihood of recovery, which includes a consideration of the solvency of other liable parties.

The administrative expenses, including legal costs, associated with dealing with claims, exercising rights of recovery and managing assets will be borne by the relevant Group Company. The Report[11] (Exhibit 252) indicates that, on the basis of the assumptions set out in that report, legal costs are approximately 27% of the overall net cost of claims (i.e. $432 million).

Adequacy of Corporations Act arrangements

Given the nature of the Entitled and Prospective Claimants, the available Corporations Act arrangements must be considered with regard to the manner in which the arrangements can accommodate liabilities emerging over a long period of time which must be met in whole or in part from a finite pool of assets. The arrangements must also achieve an equitable distribution of available assets amongst all claimants.

In our submission, for an equitable distribution to be achieved:

- to the maximum extent possible over time all claimants, whether they have an existing claim or not, should receive an equitable share of the available funds;

[10] See section 11A *Dust Diseases Tribunal Act 1989.* It is common for the Tribunal to award provisional damages in proceedings, see for example *Nasr v Seltsam Pty Limited* [2004] NSWDDT 6 and *Russell v Cockatoo Dockyard Pty Limited* [2004] NSWDDT 7.

[11] See section 9.6.2.

- the available funds should be managed to provide the maximum return to claimants; and
- the amounts payable in respect of a particular claimant should be provided (on a cash basis) as quickly as possible following the incurrence of a recoverable expense or in the case of future loss or damage as soon as the injury and its possible development has stabilised sufficiently or has developed sufficiently to permit assessment of that loss and damage with a reasonable level of certainty.

The major issues in relation to the Corporations Act are:

(a) the test as to when a company with large prospective tort liabilities becomes insolvent;

(b) the directors' duties vis insolvent trading and the duty to creditors;

(c) in the context of a liquidation, administration or a scheme of arrangement, the extent to which mere expectancies are provable, when they are provable and how the amount of the unliquidated claim would be determined for the purposes of the distribution of dividends;

(d) in the context of a scheme of arrangement or deed of company arrangement, who may be classified as a creditor, who may vote at a creditor's meeting and the extent to which the arrangement could accommodate the particular issues relating to all classes of claimants; and

(e) the special treatment provided to the distribution of the proceeds of policies of liability insurance.

The core problem associated with the external administrations under the Corporations Act and directors' duties lies in the questions as to what is a debt, who is a creditor and what debts or claims are provable in that administration.

The Characteristics of a Claim in Tort

A claim in tort which has not been settled or in respect of which there is no judgment is a claim for an unliquidated sum and, as such, there is no present amount payable. Following the inhalation of asbestos in circumstances where there is a breach of a duty of care, an injury and damage may or may not eventuate. There is no certainty that it will.

A cause of action in negligence does not arise until there is damage. Damage does not arise upon the inhalation of asbestos or even upon penetration of the lung by asbestos fibre – there must be some injury such as breathlessness or the development of the symptoms of mesothelioma[12]. There has been much judicial debate about the principle established in *Cartledge* v *E Jopling & Sons Ltd* [1963] AC 758 that, for the purpose of limitation rules in relation to tort claims, the limitation period commences when the damage occurs, whether or not the victim is aware of it. Some have pushed for actual or constructive awareness as the critical time. The authorities are reviewed and discussed by Wilcox J in *Nixon v Philip Morris (Australia) Ltd* (1999) 165 ALR 515 at pages 530 – 536. This issue does not have to be resolved from present purposes but the important points are:

- there is no claim in negligence unless and until there is actionable damage; and

[12] See the discussion in *Orica Ltd v CGU Insurance Ltd* [2003] NSWCA 331 at paragraphs 28 – 33 and 72 –78.

- there will be real unresolved issues as to when this occurs which may be critical in the present context of determining which claims are provable.

Some claimants may have alternate causes of action framed under legislation such as the Trade Practices Act 1974 or other legislative provisions. In each case the determination of whether or not there is a present, future or contingent claim or merely a prospective entitlement will depend upon an examination of the statutory provision. In the case of an action under the Trade Practices Act for damages, the action would normally be brought under section 82 or in some cases under section 87. Section 82 gives a right of recovery only in respect of "a person who suffers loss or damage …". Similarly, section 87, although providing some remedies where there is a likelihood of loss or damage in the case of compensation remedies the person must have suffered loss or damage (see section 87(1A)(c) and section 87(2)(d). Again, a person who has yet to suffer loss or damage (and who may or may not ever do so) does not have a cause of action to recover damages or compensation.

In the circumstances here there are Entitled Claimants, whose claims are presently actionable, and Prospective Claimants, who have no present loss or damage but a potential for damage to emerge in the future. There is also a group of Entitled Claimants who may have suffered damage that is actionable but are not and could not be reasonably expected to be aware of it. The position of this group is unclear and will depend on the interpretation of section 553 of the Corporations Act having regard to the principles discussed in *Cartledge* and subsequent cases.

The Test of Insolvency

Section 95A of the Corporations Act provides as follows:

(1) a person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.

(2) a person who is not solvent is insolvent.

The test of insolvency is essentially a cash flow test, although the courts in certain circumstances have considered other indicators of a company's ability to pay its debts, such as balance sheet deficiency.

As a consequence, the Group Companies may in theory remain solvent so long as they are able to pay debts as and when they become due and payable within a future period, notwithstanding the fact that there may be significant prospective liabilities which may or may not arise after that period but may have a certain degree of probability of arising. The essential question is what classes of debt are to be considered, including how far in the future one has to look in determining the class of debt to be considered.

Judicial pronouncements in relation to the question of solvency in the context of companies such as the Group Companies do not throw a great deal of light on how the matter should be addressed or clarify whether in this context (and in the context of directors' duties with regard to insolvent trading which are discussed below) what is being referred to in s95A as a debt is primarily a debt where there is a present legal obligation to make a payment, or whether future or contingent debts or expectations need to be considered, and in that regard how far into the future one needs to look. It may depend on the particular context, the degree of deficiency of assets and other factors

all of which contribute to uncertainty. This uncertainty will in turn impact on the achievement of the public policy objective of an equitable distribution to all claimants over time that we have identified.

The High Court in *Insurance Commissioner v Associated Dominions Assurance Society Pty Limited* (1953) 89 CLR 78 considered the question of whether or not a liquidator should be appointed for a life insurance company. Mr Justice Fullagar took the approach that an ability to pay contingent and future claims must be taken into account along with an ability to pay present claims in assessing the solvency of an insurer.[13] His Honour noted the peculiar features of an insurer's liabilities in that they were both substantial and often largely contingent. These features made the task of assessing a life insurance company's financial position more difficult than in the case of an ordinary commercial concern. As a consequence, it was necessary to begin by making some estimation of the cost of future claims and future receipts from premiums as well as income from investments. At page 110 Mr Justice Fullagar makes the following observations:

> The making of a decision is a matter which must inevitably be attended with some anxiety. The primary question of solvency is not such a clear cut question as it normally is in the case of an ordinary commercial undertaking. The standard accepted by actuaries is in some degree artificial, and in some degree elastic. I cannot overlook the necessity for caution …
>
> The central and outstanding fact in the whole case appears to me to be that the company is insolvent. I regard this as quite clearly established. The company is insolvent not merely in a technical sense but in a practical and commercial sense, not merely in slight degree but in very serious and substantial degree. This does not mean that it is unable at the moment to pay its debts as they fall due. It could, so far as the evidence goes, discharge its current liabilities tomorrow, and it will for some time to come be able to pay its policy holders in full as and when their claims mature. But it is highly probable – practically certain, I think, as matters stand – that it will in the not very distant future be unable to discharge in full claims under maturing policies. When that event will occur cannot in the nature of things, be precisely stated. I did not understand it to be suggested that it was likely to occur before 1960 [i.e. 7 years after the date of the decision].
>
> That being the position of the company, there is, in my opinion, a high degree of probability that, if it is not placed in liquidation, policy holders whose claims mature in the near future will be paid in full at the expense of those whose claims mature in the more distant future. Many, of course will already have been paid in full, and nothing can be done about that. But such a state of affairs ought not, in my opinion, to be allowed to continue. In a winding up all policy holders will stand on an equal footing, whether their claims are due to mature soon or late. It seems to me to be prima facie, just and equitable – just and equitable from the point of view of the policy holders generally – that a company which finds itself in the position of this company should be wound up.

Clearly, in this decision policy considerations and a practical commonsense analysis lead the High Court to conclude that the company was insolvent particularly having regard to the significant deficiency of assets compared to prospective liabilities. It should be noted that this case only deals

[13] It needs to be carefully noted here that the liabilities were liabilities arising under life insurance contracts and most of those contracts would have had the characteristic of a whole of life contract of life insurance where the element of uncertainty was not whether or not an event in the future would occur but when it would occur. Therefore the claims would have included claims that could be properly described as future claims, that is there was a present obligation to pay at a future date and in some cases where the insured event had not yet occurred the claims would have also been contingent in the sense that the date on which the obligation arose was contingent upon the date of death. The case is not considering claims of a type found in the present circumstances where there may be no present right to bring proceedings and the claim is a mere expectancy

with present, future and contingent claims under contract, and not expectancies (ie claims that have not arisen).

The Duties of Directors

Insolvent Trading

The same dilemma faced by the High Court in the *Associated Dominions* case faces directors under provisions of the Corporations Act, such as section 588G, where a director may incur a liability when a company incurs a debt at the time that the company is insolvent or will become insolvent by incurring that debt and at the time there are reasonable grounds for suspecting that the company is insolvent or would so become insolvent as the case may be.

Again we see that the normal application of these principles looks to issues of cashflow and does not clearly and immediately call for consideration of wider issues of the type addressed by Mr Justice Fullagar. Although there is no equivalent to s459D(1)[14] in the insolvent trading provisions, it is clear that future and contingent claims which ultimately sound in liquidated damages[15] (eg. a future obligation to pay rent under an existing lease) should be considered in determining whether or not a company is insolvent for the purposes of these provisions. The question is how far into the future directors should look or be expected to look.

If there is a reasonable (if not a high) likelihood of a cash deficiency in the future, it may be preferable for the directors to take steps that permit the reduction of payments to Entitled Claimants to protect the interests of all other claimants. However, placing a company with these types of liabilities into liquidation may disentitle the Prospective Claimants.

The insolvent trading provisions would, it is submitted, allow the Group Companies to continue to incur debts without exposing directors to personal liability so long as they are satisfied that the assets (together with future investment returns of the company) could meet present, future and contingent liabilities likely to be payable in some reasonable period looking forward. How far forward one needs to look will depend on the types of considerations discussed by Mr Justice Fullagar in *Associated Dominions*. The curious consequence of seeking to wind up the companies [16] before there is a technical insolvency for Corporations Act purposes may be to permanently deny persons who have a mere expectancy but who are not contingent creditors at the Relevant Date of their rights. An early winding up could ensure a solvent outcome for those with provable debts ie that those persons are paid in full and the balance referred to the members pursuant to section 563A.

This is similar to the paradox discussed in *Re Berkley Securities (Property) Ltd*.[17] That case concerned an issue under the United Kingdom Companies Act in which a claim for damages in tort which had not been liquidated by judgment before the commencement of the winding up was

[14] s495D(1) of the Corporations Act specifically provides that, in relation to certain winding up applications but not in relation to voluntary administration or other winding up applications, in determining whether or not the company is insolvent the Court may take into account contingent or prospective liabilities.

[15] *Hawkins v Bank of China* (1992) 26 NSWLR 562

[16] for example unjust and equitable grounds.

[17] (1980) 1WLR 1589: See also the discussion in the Law Reform Commission Report No 45 "General Insolvency Inquiry" Volume 1 at paragraph 779 and following.

relevant in determining whether or not the company was insolvent but because the amount was unliquidated the tort claim was not capable of being admitted as a provable claim until such time as judgment was actually obtained. If at a subsequent point of time judgment was obtained, the Claimant could then prove the debt. The Claimant would not be entitled to disturb any prior distribution to other creditors but would be entitled to participate in the undistributed assets thereafter.

Duty to creditors

The directors may also, in certain circumstances, have a duty to take into account the interests of creditors[18]. Although there is a lack of precision in the case law as to the point at which directors must consider the interests of creditors, generally speaking that duty arises when the company is insolvent or nearing insolvency[19].

Therefore, if the Group Companies are insolvent or nearing insolvency, this duty will prevent the directors from continuing to pay out Entitled Claimants. This places the directors in an unenviable position, as they may be prevented from paying Entitled Claimants, despite the validity of their claims.

Liquidation

Cessation of Payments

Upon a company being placed into liquidation, the liquidator will immediately cease paying any claimants, until such time as the liquidator is able to come to a view as to the assets available and debts and claims payable by the company. This delay is an important consideration in the formulation of an appropriate public policy response.

In recent insurance company collapses, there was an immediate cessation of payment. For example, in the recent HIH collapse the Commonwealth Government, through a fund, has paid certain personal injury claims on the basis that it takes an assignment of all the rights of the insured so that it can then stand in the insured's shoes as the debtor in the winding up. It has, in effect, guaranteed payment in consideration of a share of the estate.[20]

In the context of personal injury claims, where there is a real likelihood of the failure to pay increasing the suffering and concern of the individual, there may need to be arrangements put in place to allow the acceleration of payments or the making of certain types of payment (eg. immediate medical expenses and care costs).

The current liquidation provisions in the Corporations Act do not cater for this situation.

[18] *Walker v Wimborne* (1976) 137 CLR 1, 7. It should be noted that the duty is probably owed to the company and it is merely the content of the duty to the company that requires creditors' interests to be considered. See for example, *Walker v Wimborne* (1976) 137 CLR 1, 7; *Spies v The Queen* (2000) 201 CLR 603.

[19] *Walker v Wimborne* (1976) 137 CLR 1; *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722.

[20] Details of the HIH Claims Support Scheme are available at www.hihsupport.com.au

Determination of Provable Debts

On a winding up, the liquidator must determine which claims will be provable in the liquidation. For this purpose, the key provision is section 553(1) of the Corporations Act. That section provides as follows:

> (1) Subject to this Division, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.

The Relevant Date for this purpose is normally the date on which the winding up commences (see Appendix A).

The important distinctions that are made by sub-section 553(1) are between:

- debts; and
- claims.

These terms are then further characterised as:

- present;
- future;
- certain;
- contingent;
- ascertained; or
- sounding only in damages.

In each case the debt or claims must be ones "the circumstances giving rise to which occurred before the relevant date". In our view, this phrase does not change the meaning of the debt or claims which are described in section 553(1) as provable and which have the characteristics of the words specified in the brackets (ie. "present or future, certain or contingent, ascertained or sounding only in damages". Rather the words mean that the relevant claim of that character must have been a claim which arose before the Relevant Date.

The current form of section 553(1) would appear to have emerged from the recommendations of the "Harmer Report"[21]. In the context of admissible claims, the Law Reform Commission recommended that claims for unliquidated damages arising from tort should be admissible. To the extent that there may be practical problems in estimating the amount of such claims, the Law Reform Commission recommended that the court be expressly empowered to direct that the quantification be determined in such manner as the court specifies. In the context of corporate insolvencies, the valuation of such uncertain claims is firstly a matter for the liquidator with a right of review by the court. The amendments were made to deal with issues relating to unliquidated claims where proceedings could presently have been commenced at the Relevant Date.

[21] Report of the Law Reform Commission, Report No.45 General Insolvency Inquiry Volume 1 at paragraph 786. See above our discussion in relation to the Berkley Securities case.

For the purposes of the insolvency provisions of the Corporations Act, a future debt may be defined as a present entitlement to receive an amount of money at a future date[22]. A contingent debt is a present entitlement to receive an amount of money upon the happening of a future event. That event may or may not in fact happen.

It is clear that unliquidated claims will constitute debts or claims for the purposes of this provision: see *Selim v McGrath* [2003] NSWSC 927.

The question that then arises is whether the reference to contingent or future claims sounding in damages will also encompass claims that may be better described as mere expectancies. Is a future or a contingent claim to be given a wider meaning than would be given to a future debt or contingent debt? *Silbermann v One.Tel Limited (In Liq)* [2002] NSWSC 295 suggests not. In that case Gzell J stated that:

> It seemed unlikely… that the legislative intention was no longer to confine an obligation to one in existence at the relevant date but to extend the category of future claim to any obligation which comes into existence at any time in the future. In my view, such a construction of section 553(1) would place an intolerable burden on a liquidator whose responsibility it is to determine which future claims are to be admitted to proof and in what amounts.

This supports the proposition that there needs to be at least an obligation in existence at the Relevant Date. If this proposition is correct, the Prospective Claimants would be unable to prove and in an insolvency will be denied any access to the available assets.

This view is reinforced by the requirement that for a debt or claim to be provable, the circumstances giving rise to the claim must have occurred before the Relevant Date. Again, this suggests that there must be a present entitlement to bring proceedings in respect of a tort claim for it to be considered.

Valuation of Claims in a liquidation

Even if the Prospective Claimants could prove in a liquidation, there is a question as to how their claims would be valued. The underlying policy in liquidations in relation to the valuation of debts and claims is that they should all be valued on the same date. For example, in the case of a foreign currency debt where exchange rates may vary, it is important that all debts be valued on the same date[23]. This is made clear by a number of provisions in the legislation. For example, where a debt or claim has an uncertain value (ie. it is unliquidated) under section 554A, the liquidator must make an assessment of the value of the debt or claim as at the Relevant Date or refer the question of the value of the debt or claim to the Court (in this case "Court" refers to the Supreme Court of the State or the Federal Court).

Section 554B provides that where the amount of a debt is admissible to proof, but as at the Relevant Date was not payable by the company until an ascertained or ascertainable date, then that amount is reduced by the amount of the discount worked out in accordance with the Regulations. This provision only operates in respect of debts but is consistent with the other

[22] In respect of the meaning of "future debt" see *Community Development Pty Ltd v Engwirda Construction Company* (1969) 43 ALJR 365; *Fisher v Madden* (2002) 54 NSWLR 179; *Expile Pty Limited v Jabb's Excavations Pty Ltd* [2004] NSWSC 284.

[23] See *Re Dynamics Corporation of America (In Liq)* [1976] 1 WLR 757.

provisions which ensure that debts and claims are to be valued at a particular date. Further Regulation 5.6.23, provides for a just estimate of the value of both debts and claims to be made for the purposes of determining a creditor's vote at a meeting of creditors.

Given that claims may not be able to be resolved until some years after the date of the winding-up, it is not clear how they are to be valued for these purposes.

It would appear that future and contingent tort claims would need to be valued as at the Relevant Date (ie. the date of winding up) and it may be at least arguable that it is the level of impairment as at that date, and not any development that may occur subsequently, which is to be taken into account for that purpose. Alternatively, as the principle is that a future loss is recoverable in a damages claim, then this future loss, including likely developments in impairment, must be assessed and allowed for in the assessment. The latter approach appears more principled but increases the difficulty of the liquidator's task. It is also consistent with the approach under bankruptcy legislation. In fact, if at a later date the claim is determined by a court (eg on stabilisation of the injury) then a bankruptcy creditor can prove for the liquidated amount but that proof will not affect any dividends already paid[24].

Even if this conclusion is incorrect the "burden on the liquidator" would appear in the circumstances here to involve the potential for claims to be submitted as provable over a very long period of time and the interaction of a provision such as section 554A dealing with the valuation of claims would appear to provide a further difficulty because it calls for a valuation "at the relevant date". If there is no actionable damage at the Relevant Date, it appears that the valuation required under section 554A must be zero. Therefore, even if Prospective Claimants may prove, they may still recover nothing.

There are also issues in respect of Entitled Claimants whose claim is an unliquidated claim at the date of winding up. If the claim is to be valued at that date, presumably the value must have regard to the future contingencies. However, it is unclear as to what would happen in circumstances where, at a subsequent point of time a tribunal or court such as the DDT determined the amount of the claim. How this interacts with the provisions of section 554A in relation to valuation is unclear.

Interaction with DDT Act

Normally proceedings for unliquidated claims are stayed in the event of a liquidation. Section 5F and 5G of the Corporations Act provide that certain excluded matters may be specified by a State and in that event those provisions of the Corporations Act will not apply in respect of the matters specified in the State Law. For example, section 10 of the DDT Act declares that the provisions of sections 471B and 500(2) of the Corporation Act are excluded matters for the purposes of section 5F of the Corporations Act in respect of proceedings under the DDT Act where they are proceedings that but for section 10 of the DDT Act could not be commenced or continued without leave of the Court. These provisions are discussed further below but it would appear that section 10 of the DDT Act may validly override the Corporations Act under section 5G[25].

[24] See *Ellis & Company's Trustee v Dixon-Johnson* [1924] 1 Ch 342

[25] See *HIH Casualty & General Insurance Limited (In Liq) & Ors v Building Insurers Guarantee Corporation & Anor* (2003) 202 ALR 610

Section 471B of the Corporations Act provides that while a company is being wound up or during provisional liquidation a person cannot begin or continue proceedings in a court against the company or in relation to property of the company or to the enforcement process in relation to such property except with leave of the court. Section 500(2) deals with the same matter following the passing of a resolution for voluntary winding-up.

Therefore, in relation to the winding-up of a company with asbestos liabilities where proceedings may be brought under the DDT Act, those proceedings may continue and may continue through to judgment. This process does not appear to sit well with the provisions of section 554A(2) providing for the liquidator to make an estimate of the value of a debt at the Relevant Date.

A further inconsistency arises in relation to jurisdictional issues. A liquidator can refer that matter to the Federal Court or the Supreme Court of the relevant State and the decision of the liquidator may be appealed to such courts. However, the DDT by the operation of section 11 has exclusive jurisdiction in respect of claims in relation to dust-related conditions, including asbestos-related conditions. These provisions seem to be at odds with each other and there may be significant legal problems in resolving the matter. For example, can the liquidator make an estimate under section 554A or must the liquidator await the completion of proceedings in the DDT? Moreover, the liquidator will need to consider whether he or she should incur expenses in defending such proceedings.

Although the DDT Act has specified 2 particular sections as excluded matters that exclusion does not appear to resolve the issue as to how the value of the debt or claim is to be determined as at the Relevant Date.

Priority issues

Under section 556(1)(f), priority is given to amounts due in respect of injury compensation, that is claims under workers compensation legislation. The claim must be a liability which arose before the Relevant Date.

The application of this provision in the current circumstances to provable claims may present some issues for resolution but it would appear at the very least that there is scope for an argument that ex-employees of Amaca and Amaba may have a priority where they can link their claim back to workers compensation legislation.

Proceeds of insurance policies

Section 562 of the Corporations Act provides, in effect, that where there is a contract of insurance which insured a company against liability to third parties and where, as a consequence, an amount in respect of that liability has been or is received by the company or the liquidator from the insurer, then after deducting certain expenses the liquidator is required to pay that amount to the third party in respect of whom the liability was incurred and to the extent necessary to discharge that liability or any part of it remaining undischarged in priority to all payments in respect of the debts which may otherwise have priority under section 556.

This provision has the result that a claimant whose liability is covered by an insurance policy will obtain a priority. It also does not address a number of practical problems which will arise in the operation of this section. For example, the insurance policy may be limited as to the amount of payments which can be made by the insurer under it. There may in fact be a number of claimants

who are entitled to have their claim paid out of the proceeds of the insurance. Does this suggest that a "first in first served" principle applies or does it suggest that the insurance proceeds are then to be further distributed in accordance with the priorities specified between claimants whose liabilities are in fact covered by the policy?

Another possibility is that following the completion of a winding up ASIC may deregister a company under section 601AC but then under section 601AG a person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if the company had a liability to the person and the insurance contract covered the liability immediately before deregistration. There is a possibility that prospective claimants may, once the company is finally deregistered, have access to insurance policies that may respond to their claims. It would not appear that those persons would be entitled to pursue insurance proceeds during the process of the winding up (see the provisions in section 562).

Schemes of arrangement and other forms of external administration

As a general principle, issues as to the admissibility of claims will be dealt with in a similar way in a scheme of arrangement as has been outlined above in respect of a winding up.

In the context of a scheme of arrangement, the key issue will be who is a creditor for the purposes of voting on and considering a proposed scheme. In this context, the term "creditor" would embrace persons whose claims would be entitled to be admitted in a proof in a winding up.[26] On the analysis set out in relation to liquidations, the scheme may therefore only deal with persons who have a present entitlement to bring proceedings in tort. Again, there would then be significant difficulties in dealing effectively with potential prospective claims which are mere expectancies.

Administration and Deeds of Company Arrangement under Part 5.3A

Part 5.3A provides a flexible means for the provision of the administration of a company's affairs. It is intended to either maximise the chances of the company or its business continuing in existence or alternatively if that is not possible to result in a better return for the company's creditors and members than would result from the immediate winding up of the company.

In order for a voluntary administrator to be appointed, the directors of the company would be required to resolve that the company is insolvent or is likely to become insolvent at some future time. If the necessary likelihood can be established, the directors can then resolve to appoint a voluntary administrator to the company. At the time of appointment, the directors' powers effectively vest in the administrator and a moratorium is imposed on all creditors.

The administrator is required to investigate the company's circumstances and to recommend to creditors whether to liquidate the company, enter into a deed of company arrangement, or simply return the control of the company to the directors of the company without any further action.

Under section 445D the Court may terminate a deed of company arrangement entered into under this Part in certain circumstances including that the deed or a part of it was oppressive or fairly unprejudicial to or unfairly discriminatory against one or more of the creditors. In forming a view on this question, it has been said that the courts must give consideration to what would have been the

[26] See *Re Australian Co-operative Foods Limited* (2001) 186 ALR 21.

position on a winding up but it may be necessary to balance the net prejudice if that is an issue suffered by particular creditors against the benefits and prejudices suffered by all.[27]

Therefore it would be important in constructing a proposal for a deed of company arrangement that it could be demonstrated that there was a benefit to creditors of dealing with the matter under that type of provision as opposed to an immediate winding up.

The creditors may agree to the execution of a Deed of Company Arrangement and such a deed binds all creditors of the company (see section 444D and in particular the discussion of that section in *Brash Holdings Limited v Katile Pty Ltd* (1994) 4ACLC 472).

The required benefit could perhaps arise if a deed could make provision for both Entitled Claimants and Prospective Claimants particularly if there was some external funding available with a Deed Administrator in respect of the arrangements. However, similar issues as to the proper identification of creditors arise in a voluntary administration. It may be possible ultimately in a voluntary administration to overcome these problems if a court was able to be persuaded to exercise its powers under section 447A to make necessary amendments as to how the provisions of Part 5.3A will operate in respect of the company so as to encompass within the classes of creditors the Prospective Claimants.

Section 447A(1) provides:

> *The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company.*

The High Court has considered this provision in *Australasian Memory Pty Limited v Brien* [2000] HCA 30. The court described this power as not being a general power standing apart from the scheme under Part 5.3A but that it was an integral part of those provisions and that it enabled the making of orders which altered the way in which the Part operated in relation to a particular company. In that case the court held that the provision could be used to confer power to make orders which would operate in the future but which arose by reason of something which had been done or not done under the provisions of Part 5.3A before the application was made. The facts involved a situation where it was alleged that a defect in procedure in the entering into and approving of a Deed of Company Arrangement resulted in those things done pursuant to the deed being of no effect. The High Court upheld orders made in the lower Court that certain provisions of the Act were to be modified in the manner set out in the order.

As a consequence this procedure may be able to be used if the court was prepared to exercise its powers to make appropriate orders to ensure that Prospective and Existing Claimants would be entitled to participate in the distribution under the arrangement.

As this position is untested it is attended by uncertainty and may take time and legal costs to resolve.

Moreover, given the need to show some benefit over and above what would occur in a winding up, the proponent of the arrangement may need to demonstrate that those creditors who would participate in the winding up if that was the course taken, were not treated prejudicially or unfairly.

[27] *Lam Soon Australia Pty Ltd (Admin Apptd) v Molit (No.55) Pty Ltd* (1996) 70 FCR 34; *BGC Contracting Pty Ltd v Kimberly Gold Pty Ltd* (2000) 18 ACLS 894.

Given the uncertainties associated with this procedure and the potential risks and complexities associated with the need for any such Deed of Company Arrangement to be approved by creditors at a meeting, it is not perceived to be a satisfactory approach to be recommended to the Commission as compared to the clear certainties which would arise from a State based statutory scheme.

Could the Corporations Act be amended to resolve these problems?

It is technically possible for the Corporations Act to be amended to provide that claims that are expectancies are provable and that the value of unliquidated claims are to be determined at the date they become liquidated. However, the likelihood of such a change being made is remote, having regard to the potential complications of seeking an amendment to a Federal law which would have Australia-wide consequences. In particular, this approach would raise serious issues in the context of all corporate liquidations or insolvencies in that:

(a) it would cut across the principle that all provable debts and claims should be valued on a single date;

(b) this, of itself, may give rise to inequities between claimants, in that later claimants will have the benefit of "interest" in the sense of their claim being valued by reference to the value of money and the like at a later date; and

(c) it would make it significantly more difficult for a liquidator to be able to distribute the assets in an equitable way because the liquidator would need to continuously monitor the prospects and quantum of future claims liabilities.

Advantages of a State scheme

We submit that the establishment of a specially designed statutory scheme under NSW law would be the most effective way to provide for speedy, fair and equitable compensation.

The laws under which these claims arise are to a large extent State-based laws, being tort law, workers compensation legislation and, in New South Wales, the WCDD Act. The issues that are faced are largely State-based for that reason, it is more appropriate for a State-based solution to be found.

A significant advantage which the State has in relation to the formulation of a scheme as opposed to an amendment of the Corporations Act (or even the testing of the ability of a court to facilitate a scheme under Part 5.3A) is that the State law can also deal with other rights which claimants may have against other parties including bodies such as the Dust Diseases Board and to bring about by way of regulation a fairer outcome which incorporates one or more adjustments to such rights.

In addition the advantages of a State-based scheme to deal with these issues are that:

(a) it could be implemented fairly quickly;

(b) it could deal with the issues of what claims will be admissible and the manner in which the assets are distributed;

(c) in doing this, it could also consider other possible approaches aimed at maximising the available assets, such as establishing fixed entitlements, eliminating legal costs, giving preference to certain payments such as medical and care costs and shifting the emphasis from the less seriously impaired to the more seriously impaired.

It could do this and, at the same time retain many of the powers of liquidators which would assist in the process of recovering assets and enforcing obligations that may be owed to the Group Companies.

It also possibly provides a basis for a far wider ranging scheme to deal with similar issues in relation to other companies and involving insurers and the like.

Structure of a State solution

There are 2 possibilities:

(a) legislating for a special scheme of arrangement to deal with the issues confronting the Group Companies; or

(b) "acquiring" the assets and liabilities of these companies, which would then be administered in accordance with State legislation.

The intention of such an approach would be:

- to apply the assets in a principled fashion consistent with a policy determined by the State as to how claims would be paid;
- to ensure that the scheme operator retained all rights to bring claims against other persons who may have a liability to contribute to the assets of the Group Companies;
- possibly to provide for interim payments including interim funding to ensure that there is not a long delay in the payment of claims on the establishment of the scheme or fund.

The scheme or fund should be constructed in a way which provides for appropriate regulatory supervision to ensure that the principles of payment are followed and to deal with situations where there may be ultimate deficiencies or surpluses arising from the process of liquidation.

The arrangements would need to ensure that there was an appropriate degree of independence so that conflicts of interest would be avoided, particularly conflicts of interests that may arise between the State itself and the fund or scheme.

Moreover, it would be important to ensure in the process adopted that rights of recovery, particularly where there are rights of recovery which may be exercised overseas, are retained and it will therefore be important that the relevant entities are able to be maintained, although their structure as companies is changed.

Power of the State Government to legislate

The interaction between Corporations Legislation[28] and State and Territory laws is dealt with in Part 1.1A of the Corporations Act. In summary, the provisions provide as follows:

(a) it is provided that it is intended that the Corporations Legislation and State and Territory law operate concurrently – section 5E;

(b) that Corporations Legislation may not apply to matters declared by State or Territory law to be an excluded matter – section 5F;

[28] See section 9 and the definition of the Corporations Legislation which includes the Corporations Act and other related legislation.

(c) certain provisions of State law may override the Corporations Legislation where they meet the requirements of section 5G;

(d) body corporates established under a State law may be registered under the Corporations Act as companies – section 5H;

(e) Regulations made under the Corporations Act may modify the operation of the Corporations Legislation in respect of its application to State or Territory laws – section 5I.

These matters and, in particular, the operation of sections 5E, 5F and 5G have been considered in detail in *HIH Casualty & General Insurance Limited (In Liq) & Ors v Building Insurers Guarantee Corporation & Anor* (2003) 202 ALR 610. This decision of Barrett J involved the consideration of the laws of a number of States and Territories relating to workers compensation legislation and motor accidents legislation and whether those laws, insofar as they dealt with the applicable principles of insolvency and rights of recovery by particular parties, would operate and not be overridden by provisions of the Corporations Act. In this regard, His Honour concluded that:

(a) the provisions of section 5E have the result that the principles of the application of section 109 of the Australian Constitution relating to legislation that was taken to cover the field did not apply but that State law could not operate where there was a direct inconsistency between the State law and the Corporations Act;[29]

(b) His Honour gave a limited operation to section 5F in that, in His Honour's view, sections of the Corporations Act could not be excluded under this provision by State or Territory law unless the particular section had some clear territorial attribute;[30]

(c) however, in relation to provisions of State law dealing with matters relating to winding up and insolvency subject to the requirements of section 5G being satisfied such provisions of State law could override the provisions of the Corporations Act but there was a need for a careful analysis of the particular provisions by reference to the requirements of section 5G.[31]

The judgment sets out the methodology one must adopt in order to analyse particular provisions in order to determine whether or not they operate effectively to set aside and to operate unconstrained by the provisions of the Corporations Act.

It is submitted that the Commissioner should recommend the establishment of a scheme of arrangement pursuant to a statute to deal with the assets and liabilities of the Group Companies. Therefore, the relevant provisions of the Corporations Act that need to be considered are those contained in Chapter 5 dealing with external administration.

Section 5G(3) provides as follows:

> (3) This section applies to the interaction between:
>
> (a) a provision of a law of a State or Territory (the ***State provision***; and
>
> (b) a provision of the Corporations Legislation (the ***Commonwealth provision***);

[29] See paragraphs 76 to 79 of the judgment at pages 641 and 642.

[30] See the discussion at paragraphs 80 to 92 of His Honour's judgment at pages 642 to 646

[31] See in particular the discussions at paragraphs 93 to 106 of His Honour's judgment at pages 646 to 650.

only if the State provision meets the conditions set out in the following table:…

The table then sets out under particular item numbers the kind of provision and the conditions that must be met. For our purposes, the relevant provision is Item 3 which is designated as a "post-commencement provision". For a post-commencement provision, the conditions to be met are as follows:

> the State provision is declared by a law of the State or Territory to be a Corporations Legislation displacement provision for the purposes of this section (either generally or specifically in relation to the Commonwealth provision).

A post-commencement provision is further described in sub-section 5G(14) as one that is enacted and comes into force on or after the commencement of the Corporations Act and is not a provision that is materially amended after that date and to which sub-sections (15) to (17) apply.

Most importantly, sub-section 5G(8) provides as follows:

> (8) The provisions of Chapter 5 of this Act do not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which the scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory.

It is therefore submitted that the State of New South Wales could establish a statute governing the external administration of the Group Companies and by that provision oust the operation of all or part of Chapter 5 of the Corporations Act.

The next question which arises is whether the State Government could, in effect, deincorporate and deregister the Group Companies as companies the subject of the Corporations Act. It is certainly the case that section 5H provides that a law of a State or Territory can affect the registration of a company under the Corporations Act. However, although that may be possible, it appears that, based on the analysis in the HIH case discussed above, a State law may not be able to deincorporate a company and in effect make that company an entity which is a form of statutory corporation or the like.

There does not seem to be any prohibition upon a State providing by State law that all the assets and liabilities of a company incorporated under the Corporations Act are transferred to some other entity. However, this would involve a change of entities and may raise problems, particularly where duties, obligations and the like are either presently or prospectively owed to one or more of the companies by parties who are overseas. If the nature of the entity is changed but the entity remains the same entity, then this problem may not arise, but it could be a serious impediment if there are significant obligations owed by overseas parties who may argue that the shift of assets and liabilities in effect relieves them of that obligation. Where those parties only have assets overseas, it will depend on whether or not an overseas court is prepared to give effect to the New South Wales law. There may be methods by which this problem could be resolved by establishing indemnities between the original company and the new entity but great care would need to be taken in respect of this step.

An Adjusted Basis of Distribution

In broad terms, the New South Wales Government has introduced laws that assist plaintiffs in pursuing tort claims involving asbestos related conditions. Appendix B sets out the principal provisions of these laws.

In addition, the reform of tort law arising from the Ipp Report[32] has not been applied to dust diseases claims[33]. It is difficult to determine the policy basis for this because the reforms apply to other torts whether they involve a long latency or not and are retrospective, in that they apply to any claim that has not been commenced, finally settled or proceeded to judgment at the date of announcement of the reform.

If there is a high likelihood of an ultimate deficiency of assets over claims, then the reforms contained in the Civil Liability Act 2002 provide a principled model for the allocation of finite assets to claimants. They are largely modelled on the Motor Accident Act 1988 and the Motor Accident Compensation Act 1999 (***Motor Accidents Scheme***) which aims in the case of third party motor accident insurance to provide an affordable premium for third party motor insurance. This premium provided a finite pool of assets and the entitlements to damages were designed to produce this outcome of affordability. The limitations reduced uncertainty and promoted greater certainty as to pricing.

Some of the policies behind the changes to procedure and damages in the Motor Accidents Scheme may be adopted to formulate a scheme for asbestos liabilities. These could include provisions:

- to bring about the early notification and resolution of claims;
- to ensure that liability questions are determined early and, following an admission of liability, to require the immediate payment of certain expenses as and when they are incurred (eg medical costs);
- to require an open and full co-operation of plaintiffs in the provision of information about their claim;
- to allow insurers who have admitted liability to have an input into treatment regimes with a medical panel resolving disputes;
- to put in place procedures (eg conciliation) to facilitate early settlements.

Other models for dealing with the same issue (a finite pool of assets and affordability) are found in workers compensation legislation. In New South Wales this legislation applies many of the same or similar approaches to tort claims as those applied in the Motor Accidents Scheme.

The object of proposals such as these is to incorporate into a scheme provisions which will give greater certainty of outcome for claimants and as a consequence greater certainty for the scheme administrator. An important part of this is to eliminate to the greatest degree possible expenses including legal expenses and applying the monies made available by that step to the benefit of claimants.

These models need to be considered in the context of the problem of the Group Companies in allocating assets to claimants. Clearly, not all of the approaches taken in the Motor Accidents Scheme may be appropriate, but it is submitted many are.

[32] See s3B(1)(b) and (g) Civil Liability Act 2002.

[33] Section 3B, Civil Liability Act 2002 (NSW).

It is not practical as part of the Inquiry to determine the precise rules which should apply in determining the kind of payments which should be made to claimants and the circumstances in which those payments should be made. That depends on the level of funding available to the scheme, a proper costing of the rules which might be adopted in relation to payments to claimants by the scheme and policy considerations which apply in determining those rules. Some of those issues, at least, can only be resolved by the government in consultation with interested parties.

Proposed Key Principles for Scheme Structure

In order to achieve the desired outcome, the proposed elements of the statutory scheme include:

- speedy, fair and equitable compensation for all existing and future 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.

Contributions

If an effective compensation scheme can be established consistent with the principles outlined above, the Board of JHI NV will recommend shareholders approve the provision of additional funding to enable compensation for all future claimants for asbestos-related injuries caused by former James Hardie subsidiary companies. To provide confidence that claimants will receive compensation and shareholders will receive appropriate certainty, details of the scheme such as those noted under the Proposed Key Principles for Scheme Structure above would need to be established, so that the scheme could be costed and appropriate contribution structures agreed.

The proposal for JHINV to make contributions to a suitably structured scheme is made without any admission of liability or prejudice to JHINV's rights or defences, but with due regard for the original intention of the Board to fund future claimants through the establishment of MRCF and for the concerns that have been raised with respect to the transactions surrounding the formation of MRCF. The directors of JHINV submit that a comprehensive resolution of the matters currently before the Commission, and the financial difficulties now facing MRCF, is in the best interests of all parties. It will provide greater certainty of equitable compensation to asbestos claimants avoid the time, expense and other negative effects of potential litigation, and hasten the removal of the uncertainty currently surrounding the company's position.

To satisfy legal and corporate governance requirements, contributions by JHINV to a scheme which the directors consider to be suitably structured will be subject to approval of the shareholders of JHINV. Such approval is expected to be by ordinary resolution, that is more than 50% of the votes cast at the meeting where the resolution is put.

Appendix A

Relevant Date

Under s553(1) of the Corporations Act, only debts and claims the circumstances giving rise to which occurred before the "relevant date" are admissible to proof against a company in a winding up.

In s9, "relevant date" is defined, in relation to a winding up, as *"the day on which the winding up is taken because of Division 1A of Part 5.6 to have begun."* The definition notes that s553(1B) modifies this definition in respect of debts and claims that arise while a company is under a deed of company arrangement if the deed terminates immediately before the winding up.

Division 1A of Part 5.6 of the Act sets out the date on which a winding up it taken to have begun in relation to various types of administration, whether the winding up occurs as a result of an order of the Court pursuant to ss 233, 459A, 459B or 461 (see s513A), or as a result of a special resolution that the company be voluntarily wound up (see s513B). An explanation of these dates is set out in the table below.

Type of administration	**Date of winding up**	**Reference**
Already in the process of being wound up	The date of the winding up that is already occurring, as determined pursuant to Division 1A	ss513A(a) and 513B(a)
Part 5.3A administration	The s513C day in relation to the administration, which is either: • the day on which the administration began; or • if the company was already being wound up when the administration began, the date of the winding up that is already occurring as determined pursuant to Division 1A	ss513A(b), 513B(b) and 513C
Provisional liquidator following Part 5.3A administration	The s513C day in relation to the administration	ss513A(c) and 513C
Winding up following Part 5.3A administration	The s513C day in relation to the administration	ss513B(d) and 513C
Deed of company arrangement (not yet terminated)	The s513C day in relation to the administration that ended before the deed was executed	ss513A(d), 513B(c) and 513C

Deed of company arrangement (terminating immediately before the court order or resolution)	In relation to debts or claims the circumstances giving rise to which occur at a time when the company is under a deed of company arrangement, the date on which the deed terminates	ss553(1A) and s553(1B)
Otherwise	The day the court order was made or the company resolution was passed	ss513A(e) and 513B(e)

Appendix B:
Provisions of Dust Diseases Tribunal Act 1989

Section	Act	Description of provision	Rationale
s10(6) & (7)	*Dust Diseases Tribunal Act 1989* (inserted by the *Corporations (Consequential Amendments) Act 2001*)	Exempts proceedings in the Dust Diseases Tribunal (***DDT***) from the provisions of ss471B and 500(2) of the *Corporations Act 2001*, which require persons wishing to commence or continue proceedings against a corporation under external administration to seek leave of the Federal Court or Supreme Court.	Presumably introduced so that proceedings brought or to be commenced in the DDT by claimants who may have a limited life expectancy are not delayed by applications for leave to commence or continue the proceedings where the defendant is in external administration. No comment on this provision is made in the Second Reading Speech. Explanatory Note: *" . . . amends section 10 of the Dust Diseases Tribunal Act 1989 to ensure that the Tribunal is not precluded by the Corporation Act 2001 of the Commonwealth from dealing with proceedings under section 11 or 12 of the Dust Diseases Tribunal Act 1989 that involve certain companies that are being externally administered under the federal law. Sections 471B and 500(2) of the Corporations Act 2001 of the Commonwealth require the leave of the Supreme Court or the Federal Court before proceedings against such companies can be commenced or maintained the amendment declares proceedings under section 11 or 12 of the Dust Diseases Tribunal Act 1989 to be excluded matters for the purposes of section 5F of the Corporations Act 2001 of the Commonwealth in relation to sections 471B and 500(2) of that Act so that they will not apply to the proceedings. The amendment then applies those provisions as laws of the State so that the Tribunal is required to grant the appropriate leave (as is currently the case)."*

s11A	*Dust Diseases Tribunal Act 1989* (inserted by the *Courts Legislation Amendment Act 1995*)	Allows the DDT to make awards of provisional damages where there is proved or admitted to be a chance that the person who is suffering from a dust-related condition in respect of which proceedings are brought in the DDT will, as a result or partly as a result of the breach of duty giving rise to the cause of action, develop another dust-related condition. Where this is the case, the DDT may award damages assessed on the assumption that the person will not develop another dust-related condition, and may then award further damages if the person does in fact go on to develop another dust-related condition. Rule 5 of the *Dust Diseases Tribunal Rules 1990* sets out the procedure to be followed in applying for provisional damages.	Section 11A was introduced to avoid the consequences of the common law "once and for all" damages rule which can operate harshly in an asbestos-related disease setting, where one asbestos-related condition often leads to another. Second Reading Speech – 31 May 1995: *"A new concept for any New South Wales court is that of provisional damages, which have been recoverable in the United Kingdom since 1985 . . . Like any other common law court, the tribunal presently has to calculate any damages awarded on a once only basis, and so has frequently to include in its award a component based on a best guess as to the probability of a further condition arising from the same injury. The glaring example is asbestosis, which may or may not progress to mesothelioma, with the probability often impossible to evaluate. The amendment sought will enable the tribunal to make an award, ignoring the likelihood of a further condition developing, but preserving the plaintiff's right to claim further damages if the further condition does arise."* Explanatory Note: *"At present, the Tribunal may assess damages only on a once-and-for-all basis even where there is a chance of a further dust-related condition developing eg asbestosis may progress to mesothelioma. The proposed amendments will enable the Tribunal to award compensation for an injury without removing the right to proceed later for compensation for a different injury arising from the same dust exposure, so*

			avoiding the necessity to include in the award a component for the possibility of a different injury developing."
s12A	*Dust Diseases Tribunal Act 1989* (inserted by the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*)	Abolishes limitation periods for dust diseases proceedings brought in the DDT.	Asbestos-related diseases are diseases of gradual onset and usually have a latency period of 30 years or more. Although the flexibility in the *Limitation Act 1969* meant that the DDT would be able to extend the limitation period in any event, it was thought that the need to make extension applications added to the length and cost of litigation in circumstances in which the plaintiff was often seriously ill. Second Reading Speech – 17 November 1998: *"Another important proposal in the bill relates to the time allowed for the bringing of common law claims for dust diseases. The existing provisions of the Limitation Act, which lay down a basic three-year limit for claims that runs from time of injury, do not easily fit the reality of gradual-onset dust diseases. Cases of dust disease may have a latency period of 30 years or more.* *The current Act allows discretion to extend the three-year and related time limit provisions based on factors such as the claimants having been unaware of the disease or its cause or extent. However, application of such provisions takes time and involve additional expense for claimants who may have a short life expectancy. In recognition of the particular circumstances applicable t dust diseases, it is proposed to minimise such technical legal hurdles by providing that those current provisions do not apply in these*

			cases." Explanatory Note: *" . . . inserts a new section 12A to abolish all limitation periods for the bringing of proceedings in relation to dust-related conditions before the Tribunal. This involves overriding provisions of the Limitation Act 1969."*
s12B	*Dust Diseases Tribunal Act 1989* (inserted by the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*)	Allows for the survival of general damages in dust diseases cases, enabling the estate of a person whose death has been caused by a dust-related injury to recover general damages, provided proceedings commenced by the person were pending in the DDT at the date of the person's death.	Section 2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act 1944* provides that the right to general damages (ie. damages for non-economic loss, such as pain and suffering) does not survive for the benefit of a person's estate. In cases involving lung cancer or mesothelioma, where the plaintiff usually does not have much longer to live, this rule necessitated urgent death-bed hearings and ex tempore judgments to ensure that the matter was determined before the plaintiff died so that his right to general damages did not die with him. Section 12B was introduced to alleviate this problem. Second Reading Speech – 17 November 1998: *"One of the main proposals relates to common law entitlements for dust diseases in circumstances where the claimant dies before his or her claim is determined by the Dust Diseases Tribunal. In those circumstances, the entitlement to general damages – that is, damages for pain and suffering, loss of amenity and related items – is automatically extinguished.*

			It is not uncommon for workers and other persons suffering from the most serious type of dust disease to have very limited life expectancy. Consequently, claimants are often under considerable pressure to try to finalise their general damages claim before death, for the benefit of their families. This has meant that in some cases hearings have been held in harrowing circumstances when the claimant is on the verge of death. Having regard to the special nature of dust diseases, the bill provides that where the claimant dies before completion of the Tribunal proceedings the claimant's estate will still be able to pursue recovery of the outstanding general damages. This is intended to avoid the arbitrariness and added distress involved in the present situation." Explanatory Note: *" . . . inserts a new section 12B to enable damages for non-economic loss to survive the death of the plaintiff in proceedings before the Tribunal. This involves overriding a provision of the Law Reform (Miscellaneous Provisions) Act 1944."*
s12C	*Dust Disease Tribunal Act 1989* (inserted by the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*)	Abolishes the settlement bar rule in relation to the settlement of proceedings by or against joint tortfeasors in the DDT.	Introduced to specifically abolish the settlement bar rule for the avoidance of doubt. This provision may have limited application, as tortfeasors in the tribunal are generally concurrent or successive, not joint. Not referred to in the Second Reading Speech.

			Explanatory Note: *" . . . inserts a new section 12C to abolish the settlement bar rule in proceedings before the Tribunal. The settlement bar rule provides that settlement of a claim with one joint tortfeasor has the effect of releasing all other joint tortfeasors. This will enable settlements involving multiple defendants to occur progressively. There is a view that the rule has already been impliedly abolished by the enactment of a provision of the Law Reform (miscellaneous provisions) Act 1946, and the Bill provides that the operation or interpretation of that provision is not affected by the proposed section 12C."*
s12D	*Dust Disease Tribunal Act 1989* (inserted by the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*)	Provides that, in determining damages, the DDT may not deduct the amount of any Dust Diseases Board (***DDB***) benefits received by the plaintiff from any damages for non-economic loss. DDB benefits may only be deducted from that component of damages awarded for economic loss (if any).	This section was introduced to avoid the result arrived at in *James Hardie & Coy Pty Limited v Newton* (1997) 42 NSWLR 729, in which the amount of DDB benefits were deducted from the general damages awarded to the plaintiff. Second Reading Speech – 17 November 1998: *"Another proposal involves the relationship between a worker's rights to workers compensation and to damages at common law in respect of the same dust disease. In the December 1997 decision of James Hardie v Newton the court of Appeal extended the previously accepted principles of offsetting between those two categories of entitlement.* *It was held in that case that although the worker's common law claim related only to damages for pain and suffering the*

			amount of weekly compensation already received by the worker must nevertheless be deducted from those damages. The Government considers that that approach tends to result in an inordinate reduction in the worker's overall entitlements in these cases. The bill will restore the status quo that applied before that decision. The result will be that workers compensation entitlements of a person claiming damages for a dust disease will still be deducted, but only from the part of damages relating to economic loss. *That approach to offsetting benefits will achieve in a reasonable way the aim of avoiding double payment of benefits for the same disease."* Explanatory Note: *" . . . inserts a new section 12D to provide that damages for non-economic loss awarded in proceedings before the Tribunal are not to be reduced by any amounts payable under the Workers' Compensation (Dust Diseases) Act 1942. This deals with the decision in James Hardie & Coy Pty Limited v Newton (1997) 42 NSWLR 729."*
s25(3)	*Dust Diseases Tribunal Act 1989* (inserted by the *Courts Legislation Amendment Act 1995*)	Allows historical evidence and general medical evidence concerning dust exposure and dust diseases which has been previously admitted in proceedings before the DDT to be admitted as evidence in other proceedings	Section 25(3) replaced Rule 4 of the *Dust Diseases Tribunal Rules 1990*, which was in similar terms and had been the subject of challenge on the basis that the DDT was acting *ultra vires* in purporting to make such a rule. The purpose of s25(3) is to avoid the unnecessary repetition of evidence in an environment in which proceedings are often urgent and in which the historical or medical issues are often common to a

		before the DDT, whether or not the proceedings are between the same parties.	large number of cases. Second Reading Speech – 31 May 1995: *"It gives sanction of the Act to a rule allowing the tribunal to accept historical evidence and general medical evidence regarding dust diseases that was given in earlier proceedings."* Explanatory Note: *"The proposed amendment incorporates rule 4 of the Dust Diseases Tribunal Rules (which is to be repealed by this Act) in the amended Act.* *The proposed subsection permits certain evidence of a general nature that has been admitted in previous proceedings before the Tribunal to be admitted as evidence in later proceedings, whether or not the same parties are involved. This is designed to avoid unnecessary repetition of evidence and to assist in expediting proceedings."*
s25A	*Dust Diseases Tribunal Act 1989* (inserted by the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*)	Allows material obtained in DDT proceedings by way of discovery or interrogatories to be used in other proceedings before the DDT, whether or not between the same parties. It should be noted that, as many claims in the DDT involve the same defendants and similar issues, and	This is an exception to the common law rule that documents discovered in one set of proceedings should not be otherwise than in the action in which they are discovered. Note that consent to production of such material is to be obtained, not from the party who produced the material, but from the party who obtained the material, or that party's solicitors.

		as the production of asbestos products ceased 20 years ago (meaning that no further relevant documents are being created), most defendants in the DDT rely on standard lists filed with the DDT pursuant to rule 7 of the *Dust Diseases Tribunal Rules 1990*. Section 25A does not apply to such standard lists (see Rule 8 of the *Dust Diseases Tribunal Rules 1990*).	Second Reading Speech – 17 November 1998: *"Several other items in the bill aim to make resolution of common law claims in the Dust Diseases Tribunal faster and more efficient. Firstly, the hearing of cases in the tribunal will be streamlined by changes to evidentiary procedures. Evidence obtained by discovery and other procedures will be able to be reused in subsequent proceedings where appropriate."* Explanatory Note: *" inserts a new section 25A to allow material obtained by discovery or interrogatories in connection with proceedings before the Tribunal to be used in other proceedings before the Tribunal."*
s25B	*Dust Diseases Tribunal Act 1989* (inserted by the *Workers Compensation Legislation Amendment (Dust Diseases and Other Matters) Act 1998*)	Prohibits the relitigation without leave of issues of a general nature which have been determined in previous proceedings in the DDT (or appeals from those proceedings), whether or not the proceedings are between the same parties. Rule 9 of the *Dust Diseases Tribunal Rules 1990* sets out the procedure to be followed where a party intends to rely on a previous	As there are a number of legal issues common to many dust diseases claims, this provision allows findings of a general nature in one case to be used in another case to save time and costs. Second Reading Speech – 17 November 1998: *"An additional change will prevent the relitigation without leave of the Tribunal of issues of a general nature that have been determined in prior proceedings. Possible examples of such issues may be the carcinogenic nature of certain types of asbestos fibres or the availability of safety precautions at a particular time. At present, the same generally applicable issues, having been determined by exhaustive and costly*

		determination of a general issue.	*examination of evidence in one set of proceedings, may have to be heard and determined afresh in later cases. If issues fall into the proposed general category where relitigation would be restricted, the tribunal would have a discretion to grant leave for the reopening of such issues in appropriate cases. Criteria in exercising that discretion will include matters such as how the previous proceedings were conducted and the availability of new evidence."* Explanatory Note: *" . . . inserts a new section 25B to provide that issues of a general nature determined in proceedings before the Tribunal (or on appeal from the Tribunal) should not be relitigated or reargued in other proceedings before the Tribunal, without the leave of the Tribunal. This would prevent the re-opening of issues already established, for example the carcinogenic nature of certain asbestos fibres, but would not apply to specific issues, for example whether a particular worker was exposed to such fibres."*