

Accounting and long-tail liabilities: the case of asbestos



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Executive summary

Long-tail liabilities arising from occupational and environmental exposure to toxic products from the mining and manufacturing industries creates a 'manufactured uncertainty' for corporations (Michaels and Monforton 2005). These toxic products include tobacco, beryllium, benzene, chromium, lead, pharmaceuticals and, importantly, asbestos. Asbestos provides a unique case of a long-tail liability because asbestosis and mesothelioma are both sequelae (pathological consequences) of asbestos exposure with long latency periods that exacerbate uncertainty about the timing and amount of workers' compensation and product liability claims.

The increasing incidence of asbestos-related disease globally and the potential inadequacy of extant corporate reporting regimes to disclose asbestos-related corporate social responsibility information to stakeholders are under-researched. The increasing quantum and nature of claims require policymakers and regulators to provide appropriate mechanisms for reporting and ensuring appropriate provisioning for current and future asbestos claims. The asbestos case study provides a foundation for the development of accounting practices for long-tail liabilities from occupational and environmental exposure to toxic products more generally.

The aim of this research is to conduct a case study of the corporate disclosures relating to the uncertainty arising from long-tail liabilities, focusing on the asbestos industry in Australia. The interaction of financial uncertainty arising from asbestos liabilities with the consequences of a period of economic downturn provides a window for exploring corporate disclosures, both financial and narrative.

To fulfil its aims, this report addresses the following specific objectives:

- to provide an overview of the global corporate and regulatory context for asbestos in three specific jurisdictions: the US, the UK and Australia
- to provide an overview of the way in which asbestos liabilities are accounted for, in both financial and non-financial terms
- to provide an overview of the academic and professional literature on social accounting
- to conduct an empirical exercise in social accounting (silent and shadow reporting) for the two corporate entities with the largest asbestos liability 'burden' in Australia
- to identify and analyse the 'gaps' revealed by the silent and shadow reports
- to assess the extent of corporate asbestos disclosures provided through corporate public information and mandatory financial reporting, and explore accountability from an alternative narrative coming from 'other' voices, external to the reporting entity, and
- to suggest alternative frameworks for reporting asbestos-related disclosures that capture the extent and nature of the asbestos problem, so as to improve disclosure and subsequently improve accountability to all stakeholders, particularly in times of economic downturn.

The Australian context provides a unique research site for examining corporate disclosures on asbestos liabilities, as the two companies with substantial asbestos legacy issues, James Hardie Industries (James Hardie) and CSR Limited (CSR), are still viable entities, unlike asbestos companies in many other jurisdictions. Additionally,

this context allows an examination of mandated disclosures under both International Financial Reporting Standards (IFRS) and US Financial Accounting Standards Board (FASB) standards.

Mandated corporate disclosures focus on the financialisation of risk by estimating future claims using a wide range of variables. While these mandated disclosures give detailed and extensive information, the accountability provided is of a particularly limited form that supports the financial stewardship only. Disclosures from other stakeholders have the potential to provide an alternative perspective for exploring the particular nuances and effects that arise from corporate exploitation of asbestos, particularly in times of economic downturn.

To explore this potential for bringing together both corporate and 'other' voices on the asbestos issue, this project conducted an empirical 'social accounting' exercise in the form of 'silent' and 'shadow' reporting in order to highlight both the economic and social impacts of asbestos more holistically. This has revealed significant gaps between what companies disclose in relation to asbestos, and what is reported in the media. These findings reinforce the widely held belief that mandatory corporate disclosures or 'accounts' suffer from inherent limitations, providing no more than a partial picture of an entity's impact on society.

Alternative accounts can be used to produce a critique of corporate behaviour, which then provides a foundation for the academically researched social account. In this case, it has proved instructive in engaging and challenging corporate disclosures and, in doing so, provides a foundation for debate.

Silent and shadow reporting demonstrates the importance and usefulness of disclosing asbestos issues both financially and non-financially. The style and rhetoric of financial and narrative disclosures differ according to the specific genre of public discourse. Corporate 'official' discourse is formulaic, providing detailed actuarial and accounting rationales that tend to be confined to the reporting of long-tail liabilities. Thus, this accountability discourse focuses on financial stewardship and prioritises the agency relationship. Shadow reporting, by contrast, makes visible the interconnectedness of constituents and provides shadow accountability by articulating the interests of a variety of stakeholders on the activities, threats and responses of James Hardie and CSR to asbestos-related issues in times of economic downturn.

Silent and shadow reports are constructed by various external stakeholders, including researchers. Silent reports use company-generated information available from all corporate disclosure sources and could include annual reports; press releases; marketing information and regulatory agency filings. Silent reports are meant to provide more comprehensive or complete SEA disclosures by collating available fragments of corporate SEA information in one format (Dey 2007). Shadow reports use external non-company publicly available information and, while the information may be difficult to verify, it incorporates responses from various stakeholders.

Silent and shadow reporting highlight the multifaceted nature of asbestos narratives and while company-generated disclosures provide salient information on the financial position, performance and cash flows, voluntary disclosures enable a moral dimension and have the potential to enhance accountability.

1. Introduction

Engagement with social and environmental accounting emerged in a serious way in the 1970s. As part of the process and development of accounting ideas, the debates, challenges and conflicts have moved through a series of changes about the nature and scope of what constitutes accounting and accountability. Accountability discourses use various texts as media for discharging accountability and making visible the connectedness between various constituents (Roberts 1991). Identifying these constituents raises the question: who is accountable and for what? Accounting, as a mandated practice, focuses primarily on agency relationships between owners and managers. While financial stewardship dominates the accountability discourse, social and environmental issues can be limited, biased or excluded from the official 'accounts' of a corporate entity. For many years the debate has been conceptualised as one where conventional accounting reflects the interests of shareholders and 'alternative accountings' go beyond this narrow financial 'economistic' scope to reflect the needs of other stakeholders (Gallhofer and Haslam 2003). The use of conventional reporting to discharge accountability in any meaningful way is considered of limited value, even though academic researchers have made use of financial reports as the primary data for 'unmask[ing] undesirable, irrational or socially irresponsible corporate behaviour' (Shaoul 1998: 237).

Financial survival and shareholder value are the primary concern of management and, in times of economic downturn, financial discourse can dominate the corporate agenda. Corporate disclosures of a social and environmental nature are often related to the telling of the 'good news' stories of the entity as a means of reputation management. The 'bad news' is often used only by those external to the corporation, including the media and academics, as a public commentary on corporate practices and processes. The media, in particular, are often used as a proxy for the public 'voice', said to be representative of a range of perceptions and interests in a given society. This project uses the practice of silent and shadow reporting to bridge the gap between company-produced information and externally produced information to highlight the views of various stakeholders in a specific context: in this case, the disclosure of liabilities arising from exposure to a toxic product, asbestos, by former asbestos manufacturing and mining companies in Australia.

Asbestos is a particularly potent issue in the Australian context. Australia has the highest incidence of asbestos-related disease per capita in the world. It arises from both occupational and environmental¹ exposure and presents considerable adverse health effects among its victims and financial risk for corporations. James Hardie Industries SE (James Hardie) and CSR Limited (CSR) were the dominant companies involved in the manufacture and extraction of asbestos in Australia. Unlike other companies with a history with asbestos, these two companies remain viable and successful building-product manufacturers. Their continued success has meant that both James Hardie and CSR are responsible for funding the litigation payments for asbestos-related disease resulting from exposure to asbestos in the workplace and the environment. The global financial crisis (GFC), while resulting in financial stresses for many industries, was particularly challenging for companies operating in global

housing markets. These two factors have created a unique opportunity to study companies in an economically sensitive industry with 'long-tail' liabilities arising from the industrial exploitation of a toxic product.

Long-tail liabilities arising from occupational and environmental exposure to toxic products from the mining and manufacturing industries creates a 'manufactured uncertainty' for corporations (Michaels and Monforton 2005). These toxic products include tobacco, beryllium, benzene, chromium, lead, pharmaceuticals and importantly, asbestos. Asbestos provides a unique case of a long-tail liability as asbestos-related disease often manifests following a long latency period, further contributing to uncertainty about both the timing and amount of related litigation claims.

This long-tail liability represents the financial risk arising from the uncertain timing and amount of liabilities. The 'long tail' derives meaning in various co-existent and co-dependent corporate contexts consisting of: the legal principle of distributive justice, the insurance framework of risk management, and the financial accounting objective of the provision of information for decision making through disclosure (Moerman and van der Laan 2011). The increasing incidence of asbestos-related disease globally and the potential inadequacy of extant corporate reporting regimes for disclosing asbestos-related corporate social responsibility information to stakeholders is under-researched in the accounting literature. The increasing quantum and nature of claims requires policymakers and regulators to provide appropriate mechanisms for reporting and ensuring appropriate provisioning for current and future asbestos claims. The asbestos case study provides a foundation for the development of accountability practices for long-tail liabilities from both occupational and environmental exposure to toxic products.

Additionally, little work has been done on asbestos as an environmental issue. The scientific focus has been on the disease burden created by the extraction and manufacture of asbestos. Any financial impact due to the degradation or remediation of the natural environment; the dumping of ore tailings on land and in the sea; the recycling of asbestos bags; the disposal of asbestos products, etc has yet to be imagined, let alone integrated into the financial or corporate social responsibility reporting of asbestos companies. Despite the obvious deleterious health effects of asbestos, alarmingly it is still being extracted and used in manufacturing in large quantities, primarily in developing countries, and this shows no signs of abating (McCulloch and Tweedale 2008). The health and corporate issues arising from the asbestos legacy will extend well into the decades to come.

The James Hardie and CSR cases have evolved in a unique environment in Australia but are nonetheless instructive for the international scene. The insights from asbestos-related research also resonate with other industries involved in the production of toxic products, including tobacco. These insights are, however, situated within jurisdictional and epidemiological constraints and opportunities that are not static. The uncertainty inherent in toxic products presents risks of corporations' exposure to current and future litigation. With the continuing and global nature of the asbestos issue and the involvement of multinational corporations, it is imperative that the legacy of asbestos and its ramifications on corporations and society be exposed to enable critique, as well as to provide a forum and agenda for debate.

1. Environmental exposure refers to exposure to asbestos that occurs outside the workplace.

1.1 WHY IS ASBESTOS AN ISSUE?

Asbestos was mined and manufactured in industrialised countries and jurisdictions such as Australia, the UK, the US, Canada, the European Union, and less-developed countries such as South Africa, mostly from just after the Second World War until the 1980s. While asbestos has been banned or restricted in many jurisdictions, it is still mined and manufactured extensively in less-developed and developing countries. There is an estimated global consumption of 2.17 metric tons which is still around half of the peak global consumption, in 1980, of 4.73 metric tons (Virta 2006: 17). Additionally, the legacy of asbestos products is manifest in countries such as Australia where the 'fibro'² home is still common, resulting in another potential 'wave' of asbestos-related disease from incidental environmental exposure (ADSA 2003, DEEWR 2012). Hence, asbestos-related issues cut across a number of different disciplinary domains. Importantly, commercial exploitation of asbestos was in the past, and remains, conducted largely by private enterprise. Therefore, as a chemical that presents a risk to health and the environment, asbestos has become a corporate risk and the identification, quantification and mitigation of its effects, along with the responsibility for handling that risk is a governance issue for corporations that operate, or previously operated, in the asbestos industry.

Health

Asbestos is toxic to human beings and results in a range of known effects, from asymptomatic scarring of the lungs (pleural plaques) to functionally limiting disease, including asbestosis and fatal cancers of the lining of the chest, heart, abdomen and lungs. Asbestosis and lung cancer are generally related to the quantum of exposure and are found among workers. Mesothelioma is a cancer primarily of the pleura and peritoneum and can result from only trivial exposure and, thus, affects both workers and the general population, often presenting decades following exposure. Australia has the highest per capita incidence of mesothelioma (DEEWR 2012, Safe Work Australia 2009), and this presents a major current health issue.

Legal

The term 'long-tail' is a feature of statistical analyses and is also used in modern litigation. Long-tail claims are increasing for various reasons, including awareness in society of legal rights and remedies, and the manifestation of loss and injury from formerly 'acceptable' practices many years later (Holyoak and Chambers 2008). Estimates of future costs for asbestos compensation have grown³ considerably in Australia, the US and the UK since the 1990s.

In many jurisdictions, such as the US, the asbestos industry has relied on 'unfavourable' accounting treatments to trigger an entitlement to protection under bankruptcy provisions. As a result of this, coupled with a dispersed industry and differing litigation environments, many companies have invoked bankruptcy

'protection' to establish trusts or schemes to fund future claims while returning to financial viability.⁴ 'The history of asbestos-related bankruptcies demonstrates the value of requiring disclosure today by companies using materials with potentially long-term liabilities' (Investor Environmental Health Network 2008).

In both Australia and the UK, debtor-in-possession type restructuring, such as that available under Chapter XI of the US Bankruptcy Code, does not exist. Therefore, companies facing the spectre of increasing asbestos liabilities have sought restructuring or re-domiciling to a more favourable jurisdiction to provide a degree of certainty. James Hardie attempted an elaborate corporate restructure in 2001, resulting in the establishment of a separate fund for asbestos liabilities, later found to be insolvent from inception, while simultaneously re-domiciling the parent company to the Netherlands. CSR also attempted unsuccessfully to restructure in 2009 and 2010.⁵

Political

One of the major challenges is the variety of legal and regulatory jurisdictions in which these firms operated as multinational entities, and in some cases, continue to operate. Each jurisdiction is likely to have unique arrangements for the legal and accounting treatment of asbestos liabilities. This lack of consistency and comparability creates uncertainty for claimants and companies alike. It also provides the opportunity for 'forum shopping' and possibly 'jurisdictional arbitrage' for those companies plagued by the uncertainty of asbestos liabilities, ultimately allowing asbestos claimants to be potentially left adrift.

Economic downturn

In late 2007, the global financial markets felt the first shockwaves of what was to become known as the 'global financial crisis' (GFC). One of the industries most affected was the US housing market where James Hardie has its primary operating businesses. CSR was also exposed significantly to this market. Where funding of asbestos claims relies on corporate viability, the social costs of bankruptcy or insolvency are immense. In times of economic downturn, such as has been experienced recently, there are incentives for corporations to maintain investor confidence, with 'the tendency of companies to underestimate the likelihood of severe financial threats and thereby conceal the risks – Enron, the subprime lending crisis, and asbestos liabilities are three examples' (Investor Environmental Health Network 2008).

Accounting

Corporate reporting to external stakeholders includes mandated annual reports and other voluntary reports such as social accounts, sustainability reports and environment reports. Accounting frameworks provide the means for disclosure of both financial and non-financial information. Financial disclosures are generally mandated through accounting standard regimes and promulgated standards such as International Financial Reporting Standards (IFRS) and US Generally Accepted Accounting Principles (GAAP). The quantification and subsequent disclosure of asbestos liabilities is problematic owing to uncertainty about the timing and

2. 'Fibro' is the name given to fibrous sheeting containing asbestos used extensively in the post-war housing boom in Australia. Its heat resistance and durability made it an inexpensive and versatile building product for Australia's hot climate (Pickett 1997).

3. Growth in the cost can be attributed to many factors including increases in claims, settlement amount, legal and administrative costs. In Australia, the US and the UK growth in claim numbers has far exceeded original projections (Donlevy and Perkins 2005).

4. In 2003, Orszag claimed that 61 US companies had filed for bankruptcy protection under Chapter 11 of the US Bankruptcy Code solely as a result of asbestos litigation (Orszag 2003).

5. CSR successfully sold off its sugar business in December 2010.

incidence of disease and the cost of claims and the time needed to settle them. Additionally, quantification is reductionist and masks the other, human aspects of asbestos problems.

Voluntary regimes also exist for other financial information and non-financial social and environmental information, such as the Global Reporting Initiative (GRI). In practice, corporate voluntary disclosures are still company-generated and arguably produce biased information.

1.2 AIMS AND OBJECTIVES

The aim of this research was to conduct a case study of the corporate responses to the uncertainty arising from long-tail liabilities, focusing on the asbestos industry in Australia. The interaction of financial uncertainty arising from asbestos liabilities with the consequences of a period of economic downturn provides a window for exploring corporate disclosures, both financial and narrative.

'Corporate accountability' implies a relationship whereby a corporation explains (gives account) and takes responsibility for its actions, both past and present, to stakeholders, past, present and future. Accounting, as currently practised, is premised on the notion of accountability to economic decision-makers who make resource allocation decisions that support a narrow principal-agent accountability to current and potential investors. Accounting has been referred to as both a technical activity and a moral discourse that conveys information through communities and affects society (Lehman 2001). Proposals to include social and environmental dimensions in reporting necessitate the broadening of both the boundaries of accountability and an extension of the disclosure regimes (Mathews 1997). Social accounting means to provide an account (report) to a wider audience on a range of subjects not covered by traditional accounting (Gray et al. 1997). To address the deficiency of traditional financial accounting, alternative forms of accountability, such as social and environmental reporting, have developed. However, corporate, social and environmental accounting (SEA) disclosures also suffer from a gap between what is reported and what is delivered in terms of social and environmental outcomes (Adams 2004). To address the gaps in both financial and SEA reporting, silent and shadow reporting has emerged as a means of capturing a range of stakeholder concerns.

Silent and shadow reports are constructed by various external stakeholders, including researchers. Silent reports use company-generated information available from all corporate disclosure sources and could include annual reports; press releases; marketing information and regulatory agency filings. Silent reports are meant to provide more comprehensive or complete SEA disclosures by collating available fragments of corporate SEA information in one format (Dey 2007). Shadow reports use external non-company publicly available information and, while the information may be difficult to verify, it incorporates responses from various stakeholders.

Silent and shadow reports are 'unofficial' attempts to provide corporate accountability and have emerged from an identification of gaps in the disclosure of corporate social and environmental accounting (SEA) information (Dey 2007: 307). These gaps are said to arise, in part, from the selective and unreliable levels of voluntary disclosures of SEA information. They also arise from the

inadequacy of mandatory reporting regimes using IFRS or US GAAP as regards to disclosure for specific social responsibility issues. The increased quantity and quality of corporate information disclosed through silent and shadow reports may result in enhanced accountability through more complete and reliable information (Dey 2007).

To fulfil its aims, this report addresses the following specific objectives:

- to provide an overview of the global corporate and regulatory context surrounding asbestos in three specific jurisdictions: the US, the UK and Australia
- to provide an overview of the way in which asbestos liabilities are accounted for, in both financial and non-financial terms
- to provide an overview of the academic and professional literature on social accounting
- to conduct an empirical exercise in social accounting (silent and shadow reporting) for the two corporate entities with the largest asbestos liability 'burden' in Australia
- to identify and analyse the 'gaps' revealed by the silent and shadow reports
- to assess the extent of corporate asbestos disclosures provided through corporate public information and mandatory financial reporting, and explore accountability from an alternative narrative from 'other' voices, external to the reporting entity, and
- to suggest alternative frameworks for reporting asbestos-related disclosures that capture the extent and nature of the asbestos problem, so as to improve disclosure and subsequently improve accountability to all stakeholders, particularly in times of economic downturn.

Silent and shadow reporting provide an opportunity for an extended accountability by allowing disclosure of information about asbestos by and for a variety of stakeholders.

1.3 RESEARCH METHOD

Previous silent and shadow reports have focused on a single company with reporting across a spectrum of social and environmental issues. This project focuses on one specific contentious issue, asbestos, in the context of economic downturn, and creates an opportunity for exploring companies with a significant uncertainty arising from asbestos-related liabilities. James Hardie does not produce stand-alone social or environmental reports and provides the researchers with an opportunity to produce this information as a silent and shadow report. CSR, on the other hand, does produce a stand-alone social and environmental account. CSR once owned and operated the only blue asbestos mine in Australia and has significant liabilities arising from its former activities in both Australia and countries receiving exported asbestos, primarily the US. CSR's primary value in this project is both as a contrast to and a comparator for James Hardie. Both James Hardie and CSR are large publicly listed companies and, therefore, disclose information to the public and investors.

The comparative year chosen for the silent and shadow reports is consistent with the financial reporting cycle of both companies, the year ending 31 March 2010. Using the same reporting year allowed the researchers to use the company's annual reports as data sources for the silent and shadow reports. The annual cycle also corresponded with the period that showed the effects of the economic downturn and some initial signs of recovery.

The silent and shadow accounts produced in this report follow the 'CSEAR⁶ approach' (CSEAR 2010a) where appropriate. The broad category headings used for the comparative reports of James Hardie and CSR are those recommended by CSEAR, supplemented with issue-specific sub-headings to reflect the focused nature of the project.

1.4 OUTLINE AND STRUCTURE

The following chapter provides the context to the asbestos issue from both a broad international regulatory and jurisdictional perspective and the nationally specific contexts of the US and the UK. The Australian landscape, including background information on James Hardie and CSR, is also included. Chapter 3 provides an overview of accounting for long-tail liabilities in general and reviews both mandatory and voluntary regimes. Chapter 4 details previous attempts at extending corporate disclosure through employing alternative reporting frameworks, including counter-accounts, social accounting and silent and shadow reporting. A discussion, with recommendations from the findings of the silent and shadow reporting from James Hardie and CSR, follows in Chapter 5. The findings of the study are summarised and conclusions drawn in Chapter 6. The silent and shadow reports are set out in the appendices accompanying this report.

6. CSEAR is the Centre for Social and Environmental Accounting Research based at St Andrews in Scotland.

2. Context

This chapter explores the regulatory and institutional context for financial liabilities arising from asbestos-related disease in several international jurisdictions. As noted earlier, asbestos is a mineral renowned for its strength, durability and, most importantly, its heat resistant qualities, and has been mined and manufactured extensively.

The potential for litigation from exposure in countries where asbestos has been either banned or tightly regulated is surrounded by uncertainty. Nonetheless, despite 'the irrefutable scientific evidence which convinced authorities in industrialised nations to ban asbestos, producers are still exporting 2 million tonnes every year to the developing world where it causes disability and death' (Clapham in Kazan-Allen 2009: 2). It has been estimated that 'more asbestos is used now in Asia than was used in America at its peak' (Lowe 2004) and as Table 2.1 below demonstrates, asbestos is still produced and used worldwide.

Table 2.1: Asbestos trade data 2009

Top five producers ⁷	(tonnes)
Russia	1,000,000
China	380,000
Brazil	288,000
Kazakhstan	230,000
Canada	150,000

Top five users	(tonnes)
China	565,313
India	340,544
Russia	276,820
Brazil	140,272
Thailand	102,738

Sources: www.ibasecretariat.org; Virta, 2010

As a consequence of the continued production and consumption of asbestos globally, asbestos exposure and the resulting health and environmental problems will continue for decades to come. It has been noted that the asbestos industry was operated globally as a cartel (Peacock 2009) and while asbestos is a global issue for both industrialised and developing nations, this chapter focuses on the more advanced litigation jurisdictions of the US, the UK and Australia where asbestos-related liability has emerged predominantly from the manufacturing industry.

The asbestos industry in the US and the UK has become fragmented and it is difficult to establish direct causal links between products, companies and disease. In Australia, however, the asbestos industry remained dominated by only two companies and provides a stark comparison to the US and the UK. The asbestos issue has gained increasing prominence in the last decade owing to the corporate reorganisation and re-domiciling of Australia's largest asbestos manufacturer, the James Hardie group in an effort to 'separate' asbestos legacy issues from its profitable

operations. Following considerable manoeuvring by James Hardie, asbestos disease lobby groups, trade unions and the government, the funding of asbestos compensation payments has become inextricably linked to the company's continued financial viability. Australia's other corporate entity involved in the asbestos industry, CSR Limited, has had a very different 'history' of managing its asbestos legacy issues. By comparison, governments and regulatory bodies in other jurisdictions have pursued alternative pathways in attempts to resolve asbestos funding issues.

2.1 ASBESTOS

2.1.1 Types of asbestos

Asbestos belongs to a family of fibrous silicates and has the desirable inherent qualities of strength, flexibility and acid and heat resistance. The word asbestos comes from ancient Greek and means 'inextinguishable, unquenchable' (Salvatore et al. 2003: 2). These qualities made it an excellent heat-resistant mineral and asbestos is found in a diverse range of products, including brake linings, building materials, fire-resistant clothing and insulation. While the term asbestos encompasses six fibrous mineral deposits, only three have been extracted on a large scale commercially: chrysotile or white asbestos; amosite or brown asbestos; and crocidolite or blue asbestos. Chrysotile accounts for 90% of the worldwide use of asbestos (Salvatore et al. 2003). Crocidolite has been mined in South Africa (McCulloch 2003) and Australia only.

Asbestos has been used since ancient times, but its commercial properties became significant during the 19th century with peak production occurring during the post-Second World War economic boom in the 1950s and 1960s (McCulloch 2003). In Australia, the use of asbestos was widespread, particularly in the mid-1950s and through to the 1960s, in a booming housing market looking for a durable, heat resistant and easily transportable building product (Haigh 2006). During the period 1945–54, 52% of the homes in the state of New South Wales (NSW)⁸ were constructed using asbestos-fibre cement or more commonly known as 'fibro' (Safe Work Australia 2009). This has also resulted in a significant environmental legacy.

2.1.2 Asbestos-related disease

The health-related risks of exposure to asbestos have been documented since at least the 1st century AD (Lowe 2004), but it was not until several landmark scientific studies in the late 1950s through to the early 1960s that a definitive link between asbestos and asbestosis, lung cancer and mesothelioma was generally accepted. While the potency of different types of asbestos is debated (Lee 2005), evidence has shown that all types of asbestos are carcinogenic to human beings (IARC Monograph Working Group 2009).

Exposure to asbestos poses health risks ranging from asymptomatic calcified scarring of the lungs, through to functionally limiting conditions such as asbestosis, lung cancer and the fatal cancer of the pleural or peritoneal cavity, mesothelioma. While asbestosis and mesothelioma are inextricably linked to asbestos exposure, lung cancer is not as definitive, especially where tobacco exposure is a factor.

7. These five countries account for an estimated 96% of world production (Virta 2010).

8. NSW is the most populous state in Australia and former domicile of James Hardie.

In the US, the maximum exposure to asbestos is said to have occurred between the 1930s and the 1960s, with consumption peaking in 1973. Deaths from asbestos-related disease peaked between 1992 and 1997, which is consistent with the known lag between exposure and mortality (Wyckoff and McBride 2003). In the US the spectre of mass litigation strategies still looms over companies.

Asbestos was not mined in the UK but it had been imported since the 1880s and used commercially for over 3,000 manufactured products (UK Asbestos Working Party 2004). The UK began regulating occupational exposure to asbestos in 1931 and banned the use of amosite and crocidolite in 1985 and chrysotile in 1999 (Wyckoff and McBride 2003). Peak production of asbestos products occurred in the 1960s and 1970s. Deaths from asbestos-related disease are estimated to have been 3,000 per year early in the 21st century and, in 2003, they were expected to triple to 10,000 per year by 2010 and then peak somewhere between 2010 and 2020, which represents a lag behind the US of 10 to 20 years (Wyckoff and McBride 2003).

In Australia, there has been a ban on the use and import of asbestos since 2003, although:

[no] one has a reliable estimate of how many tens of thousands of asbestos disease cases...have already occurred in Australia...World authority on asbestos mortality, Professor Douglas Henderson...has estimated Australia will see about 13,000 cases of mesothelioma by 2020, and another 30,000 to 40,000 cases of asbestos-related lung cancer (Hughes in Spender 2003: 226).

Patterns of claims relating to exposure and subsequent disease in Australia are complex owing to the extent of production and use of asbestos, but it is often referred to as occurring in three waves. The first wave relates to exposure from the mining of asbestos, which is now regarded as being in decline. The second wave relates to exposure from the manufacture, use and installation of products containing asbestos, which is not expected to peak until somewhere between 2015 and 2020. And the third wave relates to environmental exposure to asbestos. This exposure occurs through the maintenance, renovation or removal of structures containing asbestos. Claims arising from this wave are expected to continue almost indefinitely because of the extent of use of asbestos in Australia and the development of the trend in do-it-yourself home renovations of older properties with asbestos products in situ (Girvan and Smees 2005, DEEWR 2012).

2.2 THE GLOBAL REGULATORY CONTEXT

A number of important supranational and multi-lateral organisations have contributed to the asbestos debate and, for the most part, have expressed unqualified support for the banning of asbestos mining, manufacture and trade. Major initiatives are summarised below.

2.2.1 World Health Organisation

The World Health Organisation (WHO) provides some alarming statistics about asbestos. As at 2010, approximately 125 million people are still being exposed to asbestos in the workplace, more than 107,000 people die each year from asbestos-related diseases following exposure to asbestos at work and it is

estimated that approximately half the deaths from occupational cancers are asbestos related (WHO 2006).

Given the characterisation of asbestos as a largely avoidable or controllable carcinogen, WHO (as a party to both the International Programme on Chemical Safety with the International Labour Organisation (ILO) and the United Nations Environment Programme (UNEP)) has published recommendations aimed at eliminating asbestos-related disease (WHO 2006). WHO's strategy for assisting member countries towards this goal is clear:

- stop the use of all types of asbestos
- provide information regarding suitable alternatives and substitutes
- take measures to prevent exposure to environmental asbestos, and
- during abatement, improve the diagnosis, treatments and rehabilitation for those that have been exposed to asbestos (WHO 2006).

2.2.2 The Rotterdam Convention

The Rotterdam Convention takes its name from its adoption in Rotterdam in 1998 by the Conference of Plenipotentiaries. The Convention entered into force on February 2004 and creates legally binding obligations for procedures governing the trade of pesticides and industrial chemicals that have been banned or severely restricted for health or environmental reasons (PIC 2008).

The convention emanated from work by United Nations Environment Programme (UNEP) and the Food and Agriculture Organisation (FAO) of the United Nations with an objective of:

Promot[ing] shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties (PIC 2008).

The Rotterdam Convention does not ban the trade in toxic substances per se; instead, it enforces procedures of consent before importation, to limit the use of these substances. Some 40 substances are specified under the Rotterdam Convention and, while the family of asbestos is included, the most commonly mined and used form of asbestos, chrysotile (white), is not covered under the convention.

2.2.3 Basel Convention

Like the Rotterdam Convention, the Basel Convention was developed under the auspices of the United Nations (UNEP) but arose from the increasing costs of disposing of hazardous waste due to increasing environmental regulations throughout the 1980s, particularly in industrialised countries. The development of 'toxic traders' shipping hazardous wastes to developing countries and Eastern Europe created international outrage, which led to the drafting and adoption in 1989 of the Basel Convention (Basel Secretariat 2011).

The central goal of the convention is to protect human health and the environment by minimising hazardous waste production. This

involves controls over the generation, storage, transport, reuse, recycling, recovery and disposal of hazardous waste (Basel Secretariat 2011). Any waste having asbestos as a constituent falls under the convention.

2.3 UK CONTEXT

The commercial exploitation of asbestos in the UK became prevalent in the 20th century and was based on the manufacture of products from imported asbestos, primarily from South Africa. The UK manufacturers tended to integrate mines vertically and, therefore, parent companies and insurers have defended claims originating from mining activities as well as claims from manufacturing and allied industries.

The UK asbestos-related deaths from mesothelioma emerge primarily from the metal plate and shipbuilding industry along with vehicle and rail rolling stock builders. Other allied building trades also have high rates of risk among employees of contracting mesothelioma (Salvatore et al. 2003). Most claims arise under Employer's Liability (EL), but some are submitted under product liability and use the common law action of liability in negligence for asbestos-related disease. Statutory means, via the Consumer Protection Act 1987, holds strict liability only for injury caused by exposure to defective products after 1988 (Best 2003), thus critically limiting non-occupational claims.

In 2001–2, three events crystallised a crisis for UK asbestos companies. The largest insurer of industrial risks, Chester Street Insurance Holdings Ltd declared insolvency, with current asbestos liabilities of £60m (Kazan-Allen 2001); Turner and Newall (T&N⁹) entered administration; and the watershed decision for asbestos litigants was given in the *Fairchild*¹⁰ case. In relation to T&N it was reported that it 'is becoming easier and easier to see a pattern in these developments, one which ensures that victims are left to bear the costs of corporate profits generated by the lucrative trade in asbestos products during the last century' (Kazan-Allen 2002: 1).

The prevalence of multinational groups and tort litigation is an issue for the UK parent companies with subsidiaries in other legal and economic jurisdictions. UK asbestos products were manufactured from imported raw material from the largest mines in South Africa, which were operated by subsidiaries of UK companies, principally Cape Asbestos Company, T&N and the Griqualand Exploration and Finance Company Limited. The last mine operated by T&N ceased operation in South Africa only in 2001 – two years after all asbestos was banned in the UK. The UK companies and insurers are facing a emerging legacy from the: *poverty and isolation of the mining regions, the ruthlessness of the employers, and the quiescence of the regulatory*

authorities [that] allowed British companies and their subsidiaries to enforce work conditions that would be unthinkable in an OECD state (McCulloch 2003: 230).

2.4 US CONTEXT

The US asbestos industry continues to operate on a smaller scale today. Asbestos has not been mined in the US since 2002, but the US continues to import asbestos, mainly from Canada, to satisfy its needs (Virta 2010). The US industry continues to convert the raw asbestos into roof products and coatings and compounds, as well as re-exporting some raw fibre. The US also exports finished products internationally (Virta, 2010). During the 20th century, the US asbestos industry boomed despite early warnings signalled by workers' compensation cases from the 1930s (Delaney 1992). The nuances of the US legal system allowed asbestos companies to minimise their liability for occupational exposure (see Castleman 1979 for examples). The landscape changed drastically in 1973, when a Texas widow of an asbestos worker won a precedent case for contracting asbestos-related disease from washing her husband's work clothes (Castleman 1979).

Reorganisations that form part of the arrangements available under Chapter XI (see page 7) allow uncertainty to be resolved by confining asbestos litigants to compensation from a limited trust, as pioneered in the high-profile case of Johns-Manville Asbestos. In the US a special set of bankruptcy provisions, dubbed 'the Manville Provisions' (section 524 (g)) were established in 1994 to facilitate the reorganisation of companies with large asbestos liabilities (White 2002). Under these provisions, the reorganised economic entity is required to establish a trust to compensate both current and future claimants. The value of 'allowed present claims' and the 'present value of future claims' are used to negotiate funding for the trust (White 2002). While plaintiffs compensated from trusts generally have their claims resolved quickly at a lower cost, these arrangements can also result in the unfair treatment of some classes of litigants (RAND 2005). In 2004, it was estimated that 73 US companies named in a substantial number of asbestos claims had filed for bankruptcy under Chapter XI (RAND 2005) with a financial toll on the US economy estimated at US\$1.4–3.0bn (Orszag 2003).

According to Wyckoff and McBride (2003: 418), as a result of the devastating effect on the US economy and workforce, global companies involved with asbestos are 'concerned that the asbestos liability universe will expand to consume the UK and European Union workforce, economy, and courts'. Despite the increase in quantum of claims, the impact of asbestos liabilities may be mitigated by regulatory and institutional differences between the UK and the US. Notably, in the UK, cases are tried without juries and most claims are related to occupational exposure rather than product liability (Wyckoff and McBride 2003). Given that the UK lags behind the US in asbestos litigation, the 'UK economy, courts and plaintiffs could be in for quite a ride in the next 15 to 20 years' (Wyckoff and McBride 2003: 425). In Australia, the story is quite different, with claims for both occupational exposure from mining and manufacture and non-occupational exposure limited to only two companies, James Hardie and CSR.

9. Turner & Newall, the major asbestos manufacturer in the UK, was purchased by Federal Mogul in the US in 1998. In 2001, Federal Mogul subsequently sought protection through a Chapter XI Bankruptcy and, despite continuing trading and profits, denied Turner & Newall asbestos claimants compensation (Kazan-Allen 2003).

10. *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 WLR 1052. In the *Fairchild* decision the House of Lords overturned both High Court and Court of Appeal judgments in the case of three asbestos claimants. One of the appellants had been exposed to asbestos while working for two different companies and the courts could not determine which fibre had caused the mesothelioma. The strict application of causation was relaxed by the House of Lords and it was determined that both employers had breached their duty to the employee (Kazan-Allen 2002).

2.5 AUSTRALIAN CONTEXT

As mentioned above, in Australia there were two dominant corporate actors in the asbestos industry, CSR and James Hardie. CSR Limited gained 'notoriety' through the devastating effects on workers and the community of the mining of crocidolite (blue asbestos) at Wittenoom in Western Australia. It is also exposed to significant asbestos claims from exports of this fibre to the US. Additionally, CSR¹¹ also manufactured asbestos products on a small scale, but James Hardie dominated the domestic product market with 'fibro', a cheap and versatile construction material containing asbestos, and this was the mainstay of the post-Second World War housing boom (Pickett 1997). Insulated sheeting containing asbestos was found in most major construction sites, many of which were government projects (public housing, schools, power plants, shipyards, etc). Asbestos was also a key component in the manufacture of other products produced by companies in the James Hardie group, most notably brake linings (Spender 2003, Haigh 2006). Although James Hardie is not alone in facing asbestos-related liability in Australia, it faces significant compensation claims because of the range of products manufactured and their dominance in the Australian market. Other large companies, as well as state and federal governments,¹² also face future claims (Prince et al. 2004).

Despite attempts to establish statutory schemes, Australian legislators have been reluctant to intervene and bear the responsibility for administering claims. Therefore, James Hardie, as a defendant in the majority of asbestos litigation, is central to arrangements for funding payments.

2.5.1 James Hardie – the company

James Hardie began asbestos operations in Australia in 1916. Despite sourcing asbestos from the CSR Wittenoom mine and its own small mine at Baryulgil, James Hardie sourced a majority of its raw material from Canada and South Africa (Carroll 1987). During the 1960s and 1970s, all James Hardie products contained asbestos. The chairman, John Reid, boasted in the 1977 Group annual report:

every time you walk into an office building, a home, a factory; every time you put your foot on the brake, ride in a train, see a bulldozer at work...the chances are that a product from the James Hardie group of companies has a part in it (in Peacock 2009: 137)

Asbestos products were manufactured by wholly owned subsidiaries of the parent company. In particular, James Hardie & Coy (Coy¹³) produced building and construction products, and Jsekarb Pty Ltd (Jsekarb¹⁴) manufactured brake linings (Prince et

11. The first verdict against CSR came in 1988 following the Western Australian government's three-year (1984-1987) relaxation of the statute of limitations for cases that arose before January 1984. A cohort of affected miners received a global settlement in 1989 (Haigh 2006). In 1998, CSR was found liable for the first mesothelioma case in Australia (Spender 2003) for a worker in one of its manufacturing plants.

12. The state and federal governments collectively have an uninsured liability exposure to asbestos of an NPV AU\$2.5bn and the remaining liability is concentrated in two companies (Law Council of Australia 2007). CAMAC's scope (see section 2.6.1 below) is limited to providing the government with advice regarding the management and regulation of corporations and markets.

13. Renamed Amaca on 23 February 2001.

al. 2004). James Hardie ceased the production of asbestos products in 1987; its operations have, however, remained predominantly in the building-product industry and have since expanded significantly into the US market. Despite the company's continued commercial success, the legacy of asbestos-related liability has remained within its subsidiaries, Coy and Jsekarb.

In 2001, James Hardie embarked on 'Project Green',¹⁵ a radical corporate restructure aimed as a comprehensive solution to 'eliminate legacy issues that would otherwise continue to detract from value creation' (JHIL 2001: 1). Consequently, the directors anticipated significant adverse reaction or stakeholder 'noise' to the reorganisation (JHIL 2001: 1). To effect the separation, Coy and Jsekarb were transferred to a newly established special-purpose entity ostensibly set up to fund current and future asbestos-related claims, called the Medical Research and Compensation Foundation (MRCF). Despite jettisoning Coy and Jsekarb, a residual risk of asbestos-related litigation claims remained with the parent company.¹⁶ In October 2001 the company created a new parent entity¹⁷ domiciled in the Netherlands, to exploit a beneficial US-Netherlands tax arrangement.¹⁸

Scepticism and suspicion surrounded the financial adequacy of the MRCF for satisfying future claims (Spender 2003) and in 2004 a Special Commission of Inquiry, the Jackson Inquiry (Jackson 2004), was established to investigate the viability of the MRCF. The Jackson Inquiry found that the MRCF had 'no prospect of meeting the liabilities of [Coy] and [Jsekarb] and that 'current arrangements available to the [MRCF] under the Corporations Act will not assist the [MRCF to] manage its liabilities' (Jackson 2004: 7, 16). The under-funded status of this entity became a major public issue,¹⁹ resulting in an alliance of asbestos victim support groups, trade unions, politicians and media that lobbied for government intervention to ensure that funding for compensation payments was available. The MRCF was ordered to recover adequate compensation for all future asbestos victims of the James Hardie group and secure additional funding (Jackson 2004) if required. The resulting arrangements, negotiated under the Amended and Restated Final Funding

14. Renamed Amaba on 20 February 2001.

15. James Hardie had planned a restructured 'Project Chelsea' in 1998, but this was abandoned. In the period of the Silent and Shadow Report, the Australian Taxation Office (ATO) was still pursuing James Hardie for tax relating to asset transfers and inter-company dividends.

16. In Australia the courts have been reluctant to 'lift the corporate veil' (Austin 1998) and find a parent company liable for the actions of a subsidiary, but significant uncertainty remains as to whether this will always be the case.

17. The former parent company (now ABN 60) was transferred to a separate entity, the ABN 60 Foundation, in exchange for partly paid shares, with AU\$1.96bn outstanding, ostensibly callable to meet any future asbestos claims against JHIL. The partly paid shares were subsequently cancelled in March 2003. This potential 'life-line' of funds for the claimants of the Group was now severed and the manoeuvring achieved complete legal separation of the asbestos legacy.

18. In 2009, James Hardie successfully sought permission from shareholders and the NSW government to become a Societas Europaeae (SE) based in Ireland. Once again, unfavourable tax treatment together with the requirement for management to reside in the Netherlands were cited as reasons for the change in domicile.

19. The Australian Securities and Investment Commission (ASIC) bought civil proceedings against the company and certain directors and officers for misleading statements, including the term 'fully-funded' in the media release announcing the creation of the MRCF (Moerman and van der Laan 2009). This case was heard during the reporting period under review.

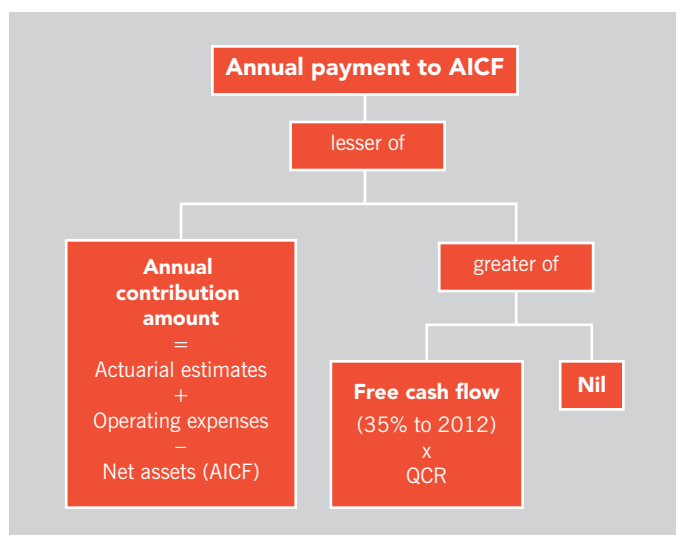
Agreement (AFFA), established a new special-purpose entity, the Asbestos Injury Compensation Foundation (the AICF), to fund asbestos claims.

James Hardie funded the AICF from an initial payment (in 2007) of AU\$184.3m and a continuing 'annual payment'. The amount of annual payment is determined using both James Hardie's consolidated financial reports and an actuarial estimate of asbestos liabilities (AFFA 2009).

2.5.2 Asbestos Injuries Compensation Foundation (AICF)

The convoluted and complex calculations for James Hardie's contributions to the AICF are ultimately tied to the group's 'free cash flow' (see Figure 2.1 below).

Figure 2.1: Contribution calculations for annual payment to the AICF (adapted from AFFA 2009)



In simplified terms the annual payments to the AICF to fund asbestos liabilities are as follows.

James Hardie pays the LESSER of

- a) the actuarial estimates (for the past year and next two years) plus a reasonable amount for operating expenses less the net assets (total book value of assets less the total book value of liabilities) of the AICF, and
- b) the GREATER of:
 - i) a proportion (35% up to 2012 and adjusted amounts thereafter) of free cash flow (adjusted or normalised by a qualifying capital ratio (QCR)), and
 - ii) NIL

Therefore, if the free cash flow (an adjusted net cash flow from operations) is negative or nil then James Hardie is not required to make a payment to the AICF. In fact, if the Annual Contribution Amount is negative, the AICF is required to 'repay' that amount to James Hardie.²⁰

20. For example, the payment in 2008 is detailed from information provided by James Hardie (JHINV 2009a). The Annual Contribution Amount was calculated as AU\$121.2m. The Free Cash Flow amount was calculated as AU\$114.7m. Therefore, the annual payment as the lesser of the two amounts to the AICF was capped at AU\$114.7m.

2.5.3 Baryulgil Mine

James Hardie also owned a small chrysotile (white asbestos) mine at the aboriginal community at Baryulgil in northern NSW, which provided a local source for manufacturing operations. The AFFA established provisions retrospectively to bring the excluded Baryulgil community within the scope of the AICF (JHINV 2005b).

2.5.4 CSR Limited

In 2001, despite a burgeoning liability both domestically and in the US, CSR announced that it did not wish to adopt the same model as James Hardie to deal with its asbestos problem. Instead it has adopted an approach to mitigate uncertainty, inter alia, through reaching settlement agreements with defendants and insurers (Spender 2003).

CSR commenced operations in 1855 as a sugar miller, developed into sugar processing and incorporated under the name Colonial Sugar Refining Company Limited. From the 1930s, CSR's operations diversified from its core sugar business into building and construction materials. It was this diversification that saw CSR become involved with asbestos through the production of 'wallboard' and several joint-venture partnerships with James Hardie to manufacture building products in the 1950s and 1960s (Bright and Salamie 2007).

Additionally, and possibly most notably, CSR operated the Wittenoom blue asbestos mine from 1948 until 1966 in Western Australia. In 1989, CSR arrived at a global settlement, reportedly for A\$300m, with their former workers and the community exposed to asbestos from the mine at Wittenoom (Bright and Salamie 2007; Spender 2003). As a result of exporting blue asbestos to the US, CSR has been named as a defendant in litigation (CSR 2010a). As at 31 March 2010, CSR had resolved 2,762 claims in Australia and approximately 135,200 claims in the United States' (CSR 2010a: 59).

Resolution and disclosure of asbestos liabilities are dependent on jurisdiction-specific legal and regulatory arrangements. It is that issue that discussed next.

2.6 LONG-TAIL LIABILITIES AND CURRENT CONTEXT IN AUSTRALIA

As noted previously, long-tail liabilities arising from exposure to toxic products cut across many different disciplinary domains. The legal domain is central as it determines the scope and nature of the 'problem'. Long-tail liabilities are an area where legal scholars have not been able to provide a satisfactory 'bright-line' solution in terms of either legal rights or accounting treatment. Hence, corporate legislators are generally in a position where they must balance the rights of society to equitable²¹ treatment and the interests of corporate activity and financial viability.

2.6.1 Corporations and Markets Advisory Committee (CAMAC)

The Corporations and Markets Advisory Committee (CAMAC) was established in 1989 to provide independent advice to the Australian government on matters that arise in corporations and financial markets (CAMAC 2011).

21. CAMAC (2008, para. 1.5) defines 'equity' as providing opportunity to individuals to 'recover compensation, regardless of when injury occurs'.

Following a recommendation by the Jackson Inquiry (Jackson 2004), investigations were made into ‘whether and to what extent special provision should be made for unascertained future claimants against the possibility of the company getting into financial difficulty’ (CAMAC 2008: para. 1.1). In particular, this applied to liabilities that arise when people seek compensation from publicly listed corporate groups for asbestos-related disease arising from personal injury claims from exposure to asbestos. The result was a report, tabled in May 2008, entitled *Long-tail Liabilities: The Treatment of Unascertained Future Personal Injury Claims* (CAMAC 2008). Although this report canvassed a number of options for modifying the law about unascertained future personal injury claims (UFC) in respect of accounting treatment, it deferred to the relevant standard-setting process, noting ‘the importance of ongoing disclosure of a company’s UFC liabilities in accordance with applicable accounting standards’ (CAMAC 2008: para. 1.5). In fact, to date no changes have been made to the law following this report.

2.6.2 Dust Diseases Board

The Dust Diseases Board (DDB) is a statutory body charged with administering the Workers’ Compensation (Dust Diseases) Act 1942–67 in NSW (Dust Diseases Board 2011). ‘The Board has exclusive jurisdiction to determine all matters in respect of a claim for compensation including questions of identity, dependency and fact of disablement and whether an award should be made’ (DDB 2011). Specifically, the DDB determines eligibility, pays all monies and administers trusts for deceased workers (DDB 2011). Non-workers’ compensation for dust-related disease, including asbestos-related disease, is dealt with through the Dust Diseases Tribunal established by the NSW government in 1989.

2.6.3 Dust Diseases Tribunal

To address non-occupational dust diseases and to relieve the increasing load on the NSW court system caused by claims for non-occupational exposure to asbestos, the Dust Diseases Tribunal (DDT) was established in 1989 to expedite the processing of claims (DDT 2011). The DDT is the only special tribunal established, worldwide. It has a specialist claims resolution process, individual case management by a judge to expedite the process, and special arrangements for hearings to facilitate the taking of evidence from those who are ill (DDT 2011).

2.6.4 Summary of the Australian context

The current disclosure of long-tail liabilities by James Hardie and CSR in Australia is shaped and constrained by the prevailing regulatory context. The DDT and DDB provide important inputs by establishing ‘claims experience’. These two bodies establish authority on eligibility for compensation, apportionment of compensation (if required) and quantum of compensation. They do not, and cannot, address the issue of the disclosure and treatment of the size or the length of the long-tail, which remains unresolved in the corporate and accounting context. The balance of the rights of society and the interests of corporations in terms of continued financial viability becomes more precarious in times of economic downturn.

2.7 SUMMARY

One of the major issues for companies in relation to the global problem of asbestos is the variety of legal and regulatory jurisdictions in which they have operated and, in some cases,

continue to operate. Each jurisdiction is likely to have unique arrangements for the legal and accounting treatment of asbestos liabilities. This lack of consistency and comparability creates uncertainty for claimants and companies alike. It also provides the opportunity for ‘forum shopping’ and possibly ‘jurisdiction arbitrage’ for those companies plagued by the uncertainty of asbestos liabilities, ultimately creating a potential for asbestos claimants to be left adrift.

Both Australia and the UK have similar arrangements for workers’ compensation claims, whereby claimants have the option of pursuing statutory benefits available under legislation (funded by insurance and employers such as James Hardie) or, possibly more lucratively, pursuing a common law claim (Girvan and Smee 2005). With the failure of insurers of asbestos companies, workers’ compensation is, however, becoming an increasingly public issue.

In the US, corporations have used the protection available under the bankruptcy regime to limit and manage asbestos payments. While in the UK and Australia ‘Chapter 11 style’ (see Footnote 4, page 7) bankruptcy protection is not available, other legal avenues have been found to restrict and mitigate asbestos claims. There are, however, some similarities in all jurisdictions. The difficulties in establishing number and quantum of claims, the lack of comparability and consistency in the accounting treatment in the estimation of liabilities, the difficulties in establishing causal links between responsibility for exposure and disease, are all still largely unresolved.

Australian litigants are primarily reliant on James Hardie to fund asbestos compensation. While the circuitous route to some resolution to the asbestos issue has strained corporation law and invoked various levels of government intervention, including a judicial inquiry, the outcome is strikingly similar to those negotiated under US Chapter XI provisions. While not divorcing itself completely from asbestos, James Hardie has managed to isolate asbestos litigants to a limited pool of funds, contingent on the continued financial viability of the company, which is now domiciled offshore and potentially out of the reach of Australian legislators.

In the jurisdictions reviewed here, the US, the UK and Australia, companies have made profits from the manufacture and sale of goods that contained the unique properties inherent in asbestos. It is somewhat ironic that the substance that helped to create wealthy multinational corporations is eroding bottom lines to the point that many asbestos companies are now facing or have found themselves already in financial distress or ruin.

Given the long latency nature of asbestos-related diseases, and the continued mining, manufacture and use of asbestos globally, a coordinated approach is required for the legal and accounting treatment of those affected to ensure that the responsibility and risk of asbestos companies is not transferred to those who are more vulnerable. Asbestos compensation is a crucial issue for claimants. Unfortunately in most cases the ability to claim is constrained, not only by the legal framework of the jurisdiction in which exposure occurred, but also by the very survival of the corporate vehicle responsible for exposing claimants to the ‘deadly dust’. The following chapter explores these transparency and disclosure issues.

3. Accounting for asbestos

The number of companies that have been destroyed by asbestos lawsuits grows every day. All of this public noise has led to an attempt to write a rule for everything (Wriston 2007: 119).

Sir David Tweedie, the former head of the International Accounting Standards Board (IASB) (in Wriston 2007: 119) asserts that in relation to asbestos liabilities: 'companies want detailed guidance because these details eliminate uncertainty about how transactions should be structured. Auditors want specificity because these specific requirements limit the number of disputes with clients and may provide a defense in litigation'. In practice, attempts to promulgate a specific standard or interpretation for toxic products generally, or asbestos specifically, have been limited.

It is well established that the information produced by following accounting standards and listing rules does not adequately reflect non-financial information (A4S 2010) and that decision-makers and stakeholders require non-financial information across a range of social and environmental issues. Disclosure requirements for accounting on these issues are broadly defined as either mandatory or voluntary. Mandatory disclosures include reporting under the aegis of legislative requirements and adopting standards promulgated by accounting standard-setting bodies, primarily the International Accounting Standards Board (IASB) and US Financial Accounting Standards Board (FASB). In relation to toxic products, mandated financial accounting disclosure is generally confined to the measurement of current and estimated future litigation claims from exposure or clean-up costs. For entities adopting International Financial Reporting Standards (IFRS), accounting for long-tail liabilities falls within the scope of IAS 37 *Provisions, Contingent Liabilities and Contingent Assets*. For entities reporting under US GAAP, FAS5 *Accounting for Contingencies* is applicable²² for non-government entities. To remedy accounting and disclosure deficiencies regarding loss contingencies from, inter alia, future product toxicity lawsuits, the FASB issued an exposure draft to revise FAS 5 in June 2008 (FASB 2009). The 'proposed accounting standard would require corporations to disclose more to investors regarding their potential losses due to product toxicity, environmental remediation and other liabilities' to prevent 'expensive surprises' when 'financial accounting principles' do not 'safeguard investors' against 'shocks' associated with 'massive bankruptcies related to asbestos product liability' (Investor Environmental Health Network 2008).

To address the lacuna in mandatory disclosures of information that has a social and environmental aspect, voluntary regimes have established various frameworks for disclosure. According to the KPMG International Survey of Corporate Social Responsibility Reporting (2008), corporate social reporting has become a mainstream activity: 80% of companies²³ surveyed said that they made social and/or environmental disclosures. Coinciding with this increase in voluntary disclosure there has also been an increase in formal assurance processes (KPMG 2008). Voluntary

regimes are often founded on the premise that stakeholder engagement is at the centre of corporate responsibility. 'Identifying and prioritising stakeholders, and being transparent about which groups and individuals a company is engaging with, is a key part of building credibility and trust' (KPMG 2008: 31). While companies have unique national and industry issues and topics of a social and/or environmental nature to report, the KPMG Report (2008) identified three common key issues: corporate governance, supply chain, and climate change. Of particular interest is the issue of corporate governance and the mitigation of risks to the company by taking into account both unexpected and expected future threats and the long-term and short-term consequences of a company's impact on society (KPMG 2008).

The following section outlines mandatory accounting disclosure regimes, followed by a review of the major corporate voluntary reporting regimes including: Global Reporting Initiative (GRI); Sustainability Reporting Guidelines; Social Accountability International (SAI); AccountAbility (AA) series; and International Organisation for Standardisation (ISO); as well as the contribution of Accounting for Sustainability (A4S) and the shift toward 'integrated reporting'.

3.1 MANDATORY DISCLOSURE REGIMES

Mandated disclosures are generally heavily regulated and compliance oriented. The long-tail liability presents significant challenges to standard setters. While the use of provisioning for estimated liabilities and related expenses is well established, asbestos liabilities rely on estimations across a range of variables, including changes to the legal and regulatory environment. The IASB and FASB²⁴ promulgate standards to account for provisions and contingent liabilities.

3.1.1 International Accounting Standards Board (IASB)

In August 1997, an exposure draft E59 *Provisions, Contingent Liabilities and Contingent Assets* was released for comment by the IASB, followed by the promulgation of IAS 37 in September 1998, effective from 1 July 1999.²⁵ As IAS 37 currently stands, a provision is a liability of 'uncertain timing and amount' arising from a legal or constructive obligation that arises as a result of a past event and will probably lead to an outflow of resources (para. 10). The Standard makes provision for both legal and constructive obligations where an entity has no recourse but to settle the obligation. A legal obligation arises from a contract, legislation or other operation of the law (para. 10). A constructive obligation can arise from 'an established pattern of past practice, published policies' or a 'current statement' from the entity indicating a responsibility that has created a 'valid expectation' from other parties (para. 10). A contingent liability is: 'a possible

24. In addition, the Federal Accounting Standards Advisory Board (FASAB) promulgates specific pronouncements for the clean-up costs associated with asbestos in government entities.

25. Australia has adopted international financial reporting standards. According to s.334 of the *Corporation Act 2001* (Cth), the Australian Accounting Standards Board published AASB 137 *Provisions, Contingent Liabilities and Contingent Assets* on 15 July 2004 for annual reporting periods ending after 1 January 2005. Entities complying with AASB 137 simultaneously apply IAS 37 as amended (AASB 137 Comparison with IAS 37). Before the adoption of IAS 37, liabilities arising from asbestos exposure would have been disclosed (or not disclosed) under the provisions of AASB 1044.

22. The James Hardie group, despite being considered an Australian group, is currently domiciled in Europe, and currently reports using both US GAAP and IFRS as it is cross-listed in the US.

23. Sample of over 2,200 companies comprising the Global Fortune 250 (G250) and 100 largest companies by revenue in 22 countries (KPMG 2008).

obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity' (para. 10).

Although the obligation involves another party, the entity does not need to know that party's identity: 'indeed the obligation may be to the public at large' (para. 20).

To recognise a provision, a reliable estimate must be made of the obligation (para. 13) calculated as the 'best estimate' of the amount needed to settle the present obligation (para. 36). This estimate should take into consideration: risks and uncertainties; market discount rate; and foreseeable changes in the law or technology. Where there is a large population a weighted estimate of 'expected value' is acceptable (para. 39). Where a provision exists but cannot be recognised because the obligation cannot be measured reliably, it is disclosed as a contingent liability (para. 13).

In October 2005, an exposure draft (*Non-financial Liabilities*) was released to promote convergence with FASB's accounting standards and US GAAP. These revisions proposed the elimination of contingencies to remove the ambiguity related to the uncertainty criteria (IASB 2005b). Pending and threatened litigation, however, now fell within the scope of the definition of a liability as an entity 'that is involved in defending a lawsuit [and] recognises the liability arising from its unconditional obligation to stand ready to perform as the court directs', with the uncertainty reflected in the conditional obligation (IASB 2005a: para. 26). Following considerable debate and discussion by the International Accounting Standards Board (IASB) on issues raised by the commentators to the exposure draft and the Board members, the issue of measurement of liabilities was raised again in January 2010 with ED/2010/01 *Measurement of Liabilities* in IAS 37 combined with a working draft of the proposed standard *Liabilities* in February 2010.²⁶

3.1.2 US Financial Accounting Standards Board (FASB)

FAS5 Accounting for Contingencies was issued in March 1975 and arose from the existing accounting practice, adopted by certain insurance companies, of provisioning for future losses (para. 50). According to FAS5 (para. 1) a contingency is: 'an existing condition, situation or set of circumstances involving uncertainty as to possible gain or loss to an enterprise that will ultimately be resolved when one or more future events occur or fail to occur'.

This uncertainty does not arise from the use of an estimate but from the likelihood that the future event will occur (para. 2). The probability of occurrence can range from probable (likely to occur) to remote (a slight chance) (para. 3). A charge to income, however, is made only when it is probable that a liability has been incurred and the amount of the loss can be reasonably estimated (para. 8). In cases where either one or both of these conditions are not met, the contingency and an estimate of the loss or a range of loss is still disclosed when there is a reasonable possibility (between probable and remote) (para. 10). 'Disclosure is preferable to accruing in the financial statements amounts so uncertain as to impair the integrity of the financial statements' (para. 84).

26. At the time of writing the IASB has an exposure draft (ED) that was scheduled for release in the second half of 2011, but this project has been 'paused' (IASB 2012).

FAS5 draws particular attention to contingencies arising from litigation, claims and assessments (paras. 33–39). In cases of pending or threatened litigation, entities must take into account whether the trigger event has occurred, the degree of probability of an unfavourable outcome and the ability to provide a reasonable estimate of the loss (para. 33) to determine whether the event is probable, reasonably possible or remote. Guidance is sought from legal counsel and advisers, prior experience with claims and the experience of other entities in similar circumstances, and management action (or inaction) in response to the threat (para. 36). In the case of unasserted claims and assessments, the paragraph 10 criterion is applicable.

A long-tail liability arising from asbestos is implicitly recognised in the disclosure requirements of a reasonably possible contingent loss that can be estimated. Additionally, included in the Basis for Conclusions, FAS5 considers the issue of the risk of loss from catastrophes for property and casualty insurers. These catastrophes, reminiscent of a long-tail liability, are discussed in relation to future claims arising both during the term of the policy and beyond. FAS5 (para. 93) clearly states that, in relation to the establishment of 'catastrophe reserves', '[t]he fact that over the long term catastrophes are certain to occur does not justify accrual before the catastrophe occurs'; a position inconsistent with the definition of a liability. FASB also considers the risk associated with the decision not to insure against losses that can be reasonably expected and asserts that accruing losses that do not relate to the current or prior period violates the matching principle (para. 86).

Nonetheless, investors 'have complained that public companies fail to warn them early enough, or at all, about risks relating to litigation and other claims that ultimately result in large settlements' (Morgan et al. 2009). In 2008, the FASB proposed amendments to FAS5 and FAS141R *Business Combinations* (FAS5 Proposal) to 'enhance the disclosure about claims, including litigation, and threatened claims' (FASB 2008b). Of the 242 comment letters received, 201 were unfavourable to an expanded disclosure regime for loss contingencies. The proposed amendments required the disclosure of all loss contingencies, even remote losses if the matter is likely to resolve in one year, and could have severe impact or significantly financially disruptive effects on a company's financial results. Additionally, those loss contingencies meeting this threshold required the disclosure of both quantitative and qualitative information, including insurance and indemnification arrangements. Of concern to the commentators was the prejudicial impact of additional disclosures on litigation, the difficulty of estimates and auditing those estimates with the attendant adverse effect on attorney-client privilege. In August 2009, FASB began its deliberations of disclosure requirements in light of the comments and decided upon broad disclosure requirements for litigation related contingencies²⁷ consistent with the objective of 'enabl[ing] a financial statement user to understand the nature of the contingency and its potential timing and magnitude' (FASB 2009). In July 2010, FASB issued another proposed update *Contingencies (Topic 450: Disclosure of Certain Loss Contingencies)* (FASB 2010). Deliberations continue.

27. Disclosures should focus on the contentions of the parties, be more robust as the likelihood and magnitude increase, provide a summary of publicly available information and indicate where users can access information if required.

3.1.3 Federal Accounting Standards Advisory Board (FASAB)

IFRS are sector-neutral standards whereas, in the US, FASAB is responsible for promulgating standards, Statements of Federal Financial Accounting Standards (SAFFASs) for use by the government. Technical releases are intended to provide guidance on the application of these standards (FASAB 2010a). The FASAB provides a regime specifically targeted at asbestos, as a hazardous material, in government entities, whether property or equipment. The liability created by the existence of asbestos relates to current and future clean-up costs, not litigation from exposure. Even so, the reporting requirements establish a precedent in relation to specific guidance for accounting for asbestos.

Technical Bulletin 2006-1 *Recognition and Measurement of Asbestos-Related Cleanup Costs* (TB 2006-1) and the following FASAB Federal Financial Accounting Technical Releases relate specifically to accounting for asbestos.

- Technical Release 10 *Implementation Guidance on Asbestos Cleanup Costs Associated with Facilities and Installed Equipment* (TR10).
- Technical Release 11 *Implementation Guidance on Asbestos Cleanup Costs Associated with Equipment* (TR11).

The Technical Bulletin and Releases are consistent with SAFFAS 5 *Accounting for Liabilities of the Federal Government*, SAFFAS 6 *Accounting for Property, Plant and Equipment*, and Technical Release 2 *Determining Probable and Reasonably Estimable for Environmental Liabilities in the Federal Government*. TB 2006-1 was released to provide guidance on asbestos-related clean-up costs for both friable (asbestos that poses an immediate health threat) and non-friable (future removal of asbestos not posing a current health threat). Accordingly, government entities estimate both friable and non-friable asbestos-related costs and recognise a liability and related expense for costs that are reasonably estimable and probable (FASAB 2006). In the case where costs are not reasonably estimable, an entity discloses information in a note to the accounts. TR10 and TR11 provide a framework for identifying and assessing assets, and hence for developing a methodology for estimating clean-up costs associated with real property²⁸ and equipment,²⁹ respectively (FASAB 2010a; 2010b).

It is well recognised that financial reporting is limited in its scope, objectives and informational content. One of the reasons for the lack of flexibility and relevance for broader decision making is the highly regulated environment that is produced by accounting standards. Information currently required under accounting standards and listing rules does not fully reflect non-financial factors, such as climate change, resource use or human rights, despite the fundamental impact that these factors may have on an assessment of both the current and future performance of a company and its contribution to the creation of a sustainable economy (IIRC 2010: 2). Thus, a range of voluntary regimes for reporting both financial and non-financial information have emerged to fill this void in reporting.

28. Includes property, plant and equipment as defined by SAFFAS 6, heritage and stewardship assets. Also includes installed equipment (FASAB 2010a).

29. Includes both decommissioning and closure/shutdowns of equipment and routine hazardous waste removal during the life of the asset (FASAB 2010b).

3.2 VOLUNTARY REGIMES

Companies and corporate stakeholders produce a range of disclosures on social and environmental factors using a variety of frameworks. There is considerable debate and academic theorising about why companies choose to disclose social and environmental accounting (SEA) information. For the purpose of this report it is, however, enough to say that this information is largely company-driven and produced and is inherently biased, just as the counter-narratives produced by stakeholders are equally partial. Formal frameworks and guidelines for corporate voluntary SEA disclosures often attempt to combine these two elements by incorporating a range of stakeholders as well as investors.

3.2.1 Global Reporting Initiative (GRI)

According to KPMG (2008) the GRI Sustainability Reporting Guidelines were the preferred framework for voluntary corporate social reporting in the top companies surveyed.³⁰ The GRI has developed a sustainability reporting framework that contains Sustainability Reporting Guidelines supplemented with Sector Supplements (industry-specific indicators) and National Annexes (country-specific information). The GRI provides a standardised approach for reporting on the economic, social and environmental performance of organisations. The GRI framework is developed using a consensus-approach with business, civil society, professional institutions and academia. The latest iteration of the Sustainability Reporting Guidelines (G3 Guidelines) was developed in 2006.³¹ Since then, identifying and reporting on community impacts, gender, human rights and content and materiality have been identified as areas for further development. Multi-stakeholder groups are currently engaged in this process (GRI 2010b).

Implementation of the GRI Guidelines is relatively complex. The standard disclosures include:

- strategy and profile disclosures, that set the context for reporting
- disclosures on management approach to this context, and
- the performance indicators, which provide comparable qualitative and quantitative information (GRI 2006).

The performance indicator categories include 'Economic', 'Environmental' and 'Social' (which includes the categories of 'Labour practices and decent work', 'Human rights' and 'Product responsibility'), further sub-divided into 'Indicator Aspects'. At the category level, organisations provide information on a range of performance factors, including management approach; goals and performance; policy; organisational responsibility; training and awareness; monitoring and contextual information (GRI 2006). The 'Aspect' level of reporting consists of organisational responses to specific core indicators, representing those identified by the GRI as of most interest to stakeholders; and additional indicators, representing emerging practice or organisation-specific material topics/practices.

30. 77% G250 and 69% N100 (KPMG 2008: 35).

31. At the time of writing G4 Guidelines are open for public comment.

As the asbestos issue is far-reaching and complex, it cuts across a number of different GRI indicators:

- economic performance indicators
- environmental performance indicators
- social performance indicators
- mining and metals sector supplement indicators.

Additionally, Sector Supplements provide additional information and, in the case of asbestos, the Mining and Metals Sector Supplement (MMSS)³² is also relevant (GRI 2010a).

These specific indicators are used to frame policy recommendations in Chapter 6 and are outlined below to demonstrate how asbestos issues could be captured within the existing GRI framework.

Economic performance indicators focus on an organisation's impact on the sustainability of a larger economic system as demonstrated by the flow of capital among stakeholders (GRI 2006). In relation to asbestos, the standards include the following aspects.

- Aspect: Economic performance
 - EC4 *Significant financial assistance received from government*
- Aspect: Indirect economic impact
 - EC9 *Understanding and describing significant indirect economic impacts, including the extent of impacts*

Environmental performance indicators focus on an organisation's impact on both living and non-living natural systems (GRI 2006). These impacts include inputs (eg energy), outputs (eg waste), effects on biodiversity, compliance with environmental regulation and expenditure on the environment. In relation to asbestos, the standards include the following aspects.

- Aspect: Biodiversity
 - EN13 *Habitats protected or restored*
 - EN14 *Strategies, current actions, and future plans for managing impacts on biodiversity*
- Aspect: Emissions, effluents, and waste
 - EN22 *Total weight of waste by type and disposal method*
 - EN24 *Weight of transported, imported, exported of treated waste deemed hazardous under the terms of the Basel Convention Annex I, II, III, and VIII, and percentage of transported waste shipped internationally*
- Aspect: Products and Services
 - EN26 *Initiatives to mitigate environmental impacts of products and services, and extent of impact mitigation*
- Aspect: Overall
 - EN30 *Total environmental protection expenditures and investments by type*

Social Performance Indicators focus on the impact of organisations on social systems under three broad sub-

performance indicators: 'Labour practices and decent work', 'Human rights' and 'Product responsibility' (GRI 2006).

1. Labour practices and decent work

- Aspect: Occupational health and safety
 - LA7 *Rates of injury, occupational diseases, lost days, and absenteeism, and total number of work-related fatalities by region*
 - LA8 *Education, training, counselling, prevention, and risk-control programmes in place to assist workforce members, their families, or community members regarding serious diseases*

2. Human rights

- Aspect: Indigenous rights
 - HR9 *Total number of incidents of violations involving rights of indigenous people and actions taken*

3. Product responsibility

- Aspect: Customer health and safety
 - PR1 *Life cycle stages in which health and safety impacts of products and services are assessed for improvement, and percentage of significant products and services categories subject to such procedures.*
 - PR9 *Monetary value of significant fines for non-compliance with laws and regulations concerning the provision and use of products and services.*

Mining and metals sector supplement indicators cover entities that are involved in exploration, mining and the primary metal processing industries and are meant to address the complete project life cycle (GRI, 2010a).

- MM3 *Total amounts of overburden, rock, tailings, and sludges and their associated risks*
- MM5 *Total number of operations taking place in or adjacent to indigenous peoples' territories, and number and percentage of operations or sites there are formal agreements with indigenous peoples' communities*

While sector supplements provide guidance on the application of the GRI guidelines in a given sector (GRI 2006), currently no specific sector supplement is available for asbestos. This results in a deficiency in authoritative guidance for voluntary reporting guidelines relating to asbestos.

3.2.2 AccountAbility

AccountAbility is an organisation that provides companies with strategies for implementing stakeholder engagement and embedding corporate responsibility and sustainable development through a set of sustainability standards, the AA Series of Standards. The series includes the following standards.

- AA1000 *Accountability principles standard* (2008) provides an 'internationally acceptable, freely available set of principles to frame and structure the way in which they understand, govern, administer, implement, evaluate and communicate their accountability' (AccountAbility 2008: 8).

32. MMSS standards are denoted with the prefix MM.

- AA1000 *Assurance standard* (2008) provides an 'independent view on the credibility of public discourse' (AccountAbility 2008).
- AA1000 *Stakeholder engagement standard* (2008) provides a framework for stakeholder engagement and dovetails with the GRI and ISO stakeholder requirements.

AccountAbility's objective is to promote accountability, defined as 'acknowledging, assuming responsibility for and being transparent about the impacts of your policies, decisions, actions, products and associated performance' (AccountAbility 2008: 6) through active engagement with stakeholders.

The AA1000 *Accountability principles standard* (2008) consists of three principles.

- The *Foundation principle of inclusivity* defines and explains an organisation's commitment to be accountable to stakeholders, including collaboration and participation in governance and decision making so as to develop a strategic response to sustainability.
- The *Principle of materiality* defines materiality as the relevance and significance of an issue to the organisation and its stakeholders.
- The *Principle of responsiveness* relates to the organisation's response to stakeholder issues through decisions, actions and communication with stakeholders.

The issue of accountability, to both current and future sufferers of asbestos-related disease, by current and former asbestos-using companies is extremely important. The focus of AccountAbility is to advance sustainable development through stakeholder accountability. Sustainability is not defined explicitly but is implicitly related to external sustainability issues that will 'impact on its performance, including economic, environmental, social and longer term financial performance, and then uses this understanding to develop responsible business strategies and performance objectives' (AccountAbility 2008: 7).

3.2.3 Social Accountability International

While the GRI and other initiatives encompass a wide range of voluntary reporting topics and variables, there are also organisations providing topic-specific voluntary standards. Social Accountability International (SAI) promotes the rights of workers globally through its SA8000 standard for decent work. In addition to the standard, SAI develops training and programmes for companies so as to encourage socially responsible labour practices (SAI 2010). The SA8000 sets out employers' voluntary requirements in the workplace, including workplace conditions, and management systems. The standard is based on national labour laws and industry standards as well as international human rights norms. The scope of the standard covers direct employees of companies, suppliers, sub-contractors and home workers (SAI 2008). In relation to asbestos, the standard has limited applicability in Australia; nonetheless, it provides an important benchmark and normative guide for companies still mining and manufacturing asbestos in other jurisdictions.

3.2.4 International Organisation for Standardisation (ISO)

The International Organization for Standardization (ISO) is a federation of standards setters and prepares international standards on a range of topics. Of interest is ISO 26000: 2010 *Guidance on Social Responsibility*³³, which is intended to provide guidance on social responsibility for a wide range of organisations in developed, developing and transition economies (ISO 2010).

ISO 26000: 2010 is not a standard or benchmark and unlike the GRI, SAI or AccountAbility standards it does not provide certification. Instead, guidance is directed toward a set of underlying principles of corporate responsibility, core subjects and issues that can be integrated into organisational systems, strategies and processes.

ISO 26000: 2010 encompasses stakeholder engagement for the assessment of an organisation's issues and impact. These are reported using seven core subjects as a guideline. Whereas the GRI allows organisations to choose a level of reporting, ISO26000: 2010 is a more holistic standard requiring comment on all core subjects. In the Australian context, asbestos issues could be addressed according to the following standards.

6.2 *Organisational governance* relates to effective governance that takes a range of factors into consideration, including a respect for stakeholder interests. In the Australian context, asbestos litigants, both current and future, are important stakeholders for both James Hardie and CSR. The guidelines focus on:

- balancing the needs of the organisation and its stakeholders, including immediate needs and those of future generations, and
- establishing two-way communication processes with the firm's stakeholders, taking into account the stakeholders' interests and assisting in identifying areas of agreement and disagreement and engaging in negotiation to resolve possible conflicts, eg the Final Funding Agreement to fund litigation for asbestos claimants.

6.3 *Human rights* encompass civil, political, economic, social and cultural rights.

- 6.3.6 *Human rights issue 4: Resolving grievances*
 - covers access to legal mechanisms and opportunities for redress or recourse, eg the Baryulgil mining community's access to funding from James Hardie.
- 6.3.9 *Human rights issue 7: Economic, social and cultural rights*
 - includes a standard of living adequate for physical and mental health and security in the event of sickness, or disability beyond his/her control.

33. During the period under investigation, the Draft International Standard ISO26000 is applicable. The final version of ISO26000 was released in September 2010.

6.4 *Labour practices* relate to the policies and procedures encompassing work performed within and on behalf of an organisation e.g. subcontracted work.

- 6.4.4. *Labour practices issue 2: Conditions of work and social protection*
 - includes policies and practices to mitigate loss of income in case of employment injury or illness.

6.5 *The environment* covers, in particular, standards concerned with pollution and wastes and for assuming responsibility for environmental burden.

- 6.5.3. *Environmental issue 1: Prevention of pollution* caused by activities and products, including the release of toxic and hazardous chemicals.
 - An organisation should seek to prevent use of chemicals and hazardous substances identified by scientific bodies or any other stakeholder as being of concern, eg under the Rotterdam convention or Basel convention.

6.6 *Fair operating practices* is concerned with an organisation's ethical conduct in its dealings with other organisations and individuals and includes issues such as social responsibilities and anti-corruption measures.

6.7 *Consumer issues* arise for products and services purchased for private purposes and covers the use, repair and disposal of such products and services.

- 6.7.4 *Consumer issue 2: Protecting consumers' health and safety* and paying particular attention to vulnerable groups.
 - Instruct consumers in the proper use of products and warn them of the risks involved.
- 6.7.9. *Consumer issue 7: Education and awareness*
 - Information about risks related to use and proper disposal, eg of asbestos.

Although no longer produced or imported in Australia, asbestos is still present in the environment and correct procedures for handling asbestos are needed, especially for home renovators (the primary constituents of the so-called 'third wave').

6.8 *Community involvement and development* refers to those in geographic proximity to the organisation's area of impact. This core standard incorporates the notion that an organisation should work in partnership with the community to strengthen civil society. In relation to asbestos, there are various community groups that support asbestos disease sufferers, including asbestos diseases associations in various states, and trade union groups.

Since asbestos manufacture and mining no longer occurs in Australia and the importation of products is prohibited under the Rotterdam Convention, ISO 26000: 2010 is limited in its application for reporting on corporate social responsibility in Australia. Even so, given the situation of continued mining and manufacture globally, ISO 26000 may provide a useful reporting framework in an international context.

3.3 INTEGRATED REPORTING

KPMG (2010a) notes a transformation in accounting and corporate reporting towards a convergence of financial and non-financial information. This presents a departure from the mandated financial accounts supplemented by voluntary SEA disclosures in the annual report or stand-alone reports using SEA reporting guidelines and frameworks. The focus on integration is twofold: integrating financial and non-financial information, short-term and long-term considerations; and integrating the notions of corporate social and environmental responsibility into the business as a systemic risk-mitigation strategy in order to be accountable to a diverse range of stakeholders (IIRC 2010; KPMG 2010a). According to the chief executive of GRI, an integrated approach is about 'rewiring homo economicus' to provide a new language to 'measure, manage and be accountable' (in KPMG 2010a: 4). While this approach appears to indicate a radical shift in the business mindset, integrated reporting is attempting to make SEA a mainstream activity.

3.3.1 International Integrated Reporting Committee (IIRC)

In August 2010, the GRI in collaboration with the Prince's Accounting for Sustainability Project (A4S) formed the International Integrated Reporting Committee (IIRC) to oversee an integrated approach to corporate reporting. The impetus for an international body to bring together organisations responsible for financial reporting as well as non-financial and sustainability reporting arose from a meeting of accounting bodies, investor companies, UN representatives and standard setters (IIRC 2010). This integrated reporting is intended to provide comparable financial, social, environmental and governance information (IIRC 2010). According to Sir David Tweedie, chairman of the IASB (at the time):

The case for globally consistent financial reporting standards is well understood and accepted. It is appropriate to apply the same global approach to other aspects of corporate reporting. This initiative represents an important step on that journey. (IIRC 2010)

The IIRC responds to the need for 'new approaches to accounting and reporting to reflect the broader and longer-term consequences' primarily to assist long-term investors make decisions with information that 'reflects the interconnected nature of environmental, social and governance factors' (A4S 2010: 1). While both mandated and voluntary regimes attempt to provide this degree of information to some extent, an integrated approach would provide a comprehensive and comparable reporting mechanism that could ultimately lead to the creation of a sustainable economy through early identification of the systemic risk arising from the corporate operating context through such factors as climate change and human rights (IIRC 2010).

The focus of this international framework is clearly on information for economic decision making by investors in a carbon-constrained and ecologically challenged global business environment. The overarching benefits of comparability and reliability resonate with the IASB conceptual framework objective of 'information relevance' since 'information is the foundation of efficient markets' (A4S 2010: 3) and should 'highlight systemic risks' (IIRC 2010). A pilot project involving approximately 80 companies to provide input into an integrated framework is underway in 2012 (see www.theiirc.org).

3.4 CURRENT MANDATORY DISCLOSURES

James Hardie and CSR report asbestos-related liabilities under their obligations arising from mandatory reporting requirements. James Hardie provides reports for the Dutch regulators using Dutch GAAP and uses US GAAP for its cross listing in the US. The financial reports for the year ending 31 March 2010 are used as the comparative year.

3.4.1. James Hardie

James Hardie has a decade-long history of controversial changes to funding arrangements for asbestos claimants. Before the establishment of the AICF in 2007, the James Hardie group did not 'establish a provision for asbestos-related liabilities' because at that time it was not 'probable and estimable in accordance with SFAS 5, 'Accounting for Contingencies' (JHINV 2005a: 116). The 'AICF has now assumed the role of managing asbestos-related personal injury claims made against certain former James Hardie group subsidiaries (JHINV 2007: 8). The trustee of the AICF provides a 'special purpose financial report' since there 'are no users who are dependent on its general purpose financial reports' (AICFL 2010: 17). The report is prepared using Australian accounting standards (A-IFRS) and recognises a provision for current and non-current asbestos liabilities. James Hardie consolidates the AICF in its US reports owing 'to its pecuniary and contractual interests in the AICF' (JHISE 2010a: 91). Under Dutch GAAP, which is IFRS-based, James Hardie consolidates the AICF as it is 'deemed a special purpose entity' (JHISE 2010b).

Hence, James Hardie reported that following the establishment of the AICF the 'company's statement of operations and balance sheet were substantially affected by our booking of a net provision for estimated future asbestos-related compensation payments' because 'we now qualify as being within the "probable and estimable" definition of Statement of Financial Accounting Standard (SFAS) No. 5 under US GAAP' (JHINV 2006: 8). This probability relates to the agreement to 'make payments to fund asbestos-related claims on a long-term basis' (JHINV 2006: 11).

The provision recorded in James Hardie's consolidated accounts (under both US GAAP and Dutch IFRS) is referred to as the 'Asbestos Liability' and 'has been calculated by reference to (but is not exclusively based upon) the most recent actuarial estimate of the projected future asbestos cash flows' (JHISE 2010b: 110). The 'Asbestos Liability' represents:

an amount of money which, if fully provided in advance (ie as of 31 March 2010) and invested in risk-free assets (such as Commonwealth Government Bonds) of term and currency appropriate to the liabilities, would generate the necessary investment income such that (together with the capital value of those assets) would be expected to be sufficient to pay for the liabilities as they fall due. (KPMG 2010b: 7).

The central estimate varies owing to other factors, including changes to discount rates (linked to government bond yield), the number of projected claims, the peak year for mesothelioma claims, and variation in disease types (JHISE 2010a: 2010b). The claims data, which form the basis of the actuarial estimate, are vulnerable to changes in variables as a result of changes in the legal and medical environment (JHISE 2010b). A critical key

assumption and the one with the greatest sensitivity is the estimated peak of mesothelioma claims which was thought likely to occur in 2010/11 (JHISE 2010b). A change in the timing of this peak could have a significant impact, eg if it were to occur in 2015/16, 'the discounted central estimate could increase by approximately 50%' (JHISE 2010a: 98–102).

For US reporting, 'while the accounting liability is based on the actuarial estimate, under US GAAP there are some adjustments that are made to the actuarial estimate to establish the liability for James Hardie's accounts' (JHISE 2010a: 7). Accordingly, the disclosed amount 'includes these cash flows as undiscounted and uninflated on the basis that it is inappropriate to discount or inflate future cash flows when the timing and amounts of such cash flows is not fixed or readily determinable' (JHISE 2010a: 92–3; JHISE 2010b: 53). Despite differences in accounting standards, the actual disclosed amount of the asbestos liability in both US and Dutch GAAP is US\$1.718 billion (JHISE 2010a; 2010b). Additionally, the asbestos liability is Australian dollar-denominated and a loss or gain on conversion to US dollars on consolidation is recorded as an adjustment to income in the group accounts (JHISE 2010a; 2010b).

3.4.2 CSR

CSR reports its asbestos-related liabilities as a 'product liability' and re-evaluates the provision every six months. The reporting framework for CSR is A-IFRS, but a significant proportion of its asbestos claims arise in the US. It provides disclosure on the background of the issue in the notes to the accounts:

CSR Limited and/or certain subsidiaries (CSR) were involved in mining asbestos and manufacturing and marketing products containing asbestos in Australia, and exporting asbestos to the United States. CSR's involvement in asbestos mining, and the manufacture of products containing asbestos, began in the early 1940s and ceased with the disposition of the Wunderlich asbestos cement business in 1977. As a result of these activities, CSR has been named as a defendant in litigation in Australia and the United States.

In Australia, asbestos related personal injury claims have been made by employees and ex-employees of CSR, by others such as contractors and transporters and by users of products containing asbestos. As at 31 March 2010, there were 692 such claims pending.

In the United States, claims are made by people who allege exposure to asbestos fibre used in the manufacture of products containing asbestos or in the installation or use of those products. As at 31 March 2010, there were 1,147 such claims pending.

CSR has been settling claims since 1989. As at 31 March 2010, CSR had resolved 2,762 claims in Australia and approximately 135,200 claims in the United States. (CSR 2010: 59–60)

CSR also provide detailed claims data for the previous five years, including the total amount spent on settlements. In 2010 this figure was AU\$33.4m, which resolved 986 claims (CSR 2010: 59–60). The history presented suggests that the value of each claim is increasing, while the number of claims is decreasing. For

example in 2007, 2,680 claims were resolved for a total of AU\$23.5m (CSR 2010: 59–60).

In terms of provisioning, CSR reports the following.

CSR includes in its financial statements a product liability provision covering all known claims and reasonably foreseeable future asbestos related claims. This provision is reviewed every six months. The provision recognises the best estimate of the consideration required to settle the present obligation for anticipated compensation payments and legal costs as at the reporting date. The provision is net of anticipated workers' compensation payments from available workers' compensation insurers. CSR does not believe there is any other source of insurance available to meet its asbestos liabilities. CSR no longer has general insurance coverage in relation to its ongoing asbestos liabilities (CSR 2010: 59–60).

Two firms of actuaries are employed by CSR to provide expert advice for valuing asbestos-related claims, Taylor Fry in Australia and Navigant Consulting, Inc. in the US, because CSR's asbestos liability occurs in these two jurisdictions. CSR makes clear that these two independent actuarial firms determine the appropriate methodology for estimating future asbestos-related liabilities and:

[t]he assessments of those independent experts project CSR's claims experience into the future using modelling techniques that take into account a range of possible outcomes. The present value of the liabilities is estimated by discounting the estimated cash flows using the pre-tax rate that reflects the current market assessment of the time value of money and risks specific to those liabilities (CSR 2010: 59–60).

CSR also details the factors that influence the estimate and outlines the assumptions and limitations of the final provision:

[h]aving regard to the extremely long tailed nature of the liabilities and the long latency period of disease manifestation from exposure, the estimation of future asbestos liabilities is subject to significant complexity. As such, there can be no certainty that the product liability provision as at 31 March 2010 will definitively estimate CSR's future asbestos liabilities. If the assumptions adopted by CSR's experts prove to be incorrect, the current provision may be shown to materially under or over state CSR's asbestos liability (CSR 2010: 59–60).

In 2010, the provision for Australian claims was determined using a central estimate or 'most likely' figure of AU\$184.8m (calculated using a discount rate of 6%). Undiscounted and inflated, that central estimate would rise to AU\$385.3m over the period to 2060 (relevant for the estimation of future Australian asbestos liabilities). For the US, the actuaries produced a base case estimate or most likely outcome.

At 31 March 2010, the base case estimate was US\$159.5m calculated using a discount rate of 4.5%. On an undiscounted and inflated basis, that base case estimate would be US\$240.5m over the anticipated further life of the United States liability (45 years). (CSR 2010: 59–60)

This results in the line item disclosure in the financial reports of AU\$455.30m for 'all known claims and reasonably foreseeable future claims and includes a prudential margin of AU\$96.8m above the aggregate most likely estimate of the future asbestos liabilities in Australia' (CSR 2010: 59–60).

3.5 SUMMARY AND CONCLUSIONS

A variety of disclosure regimes provide a framework for companies 'to account' for asbestos. Although the manufacture and extraction of asbestos has ceased in Australia, asbestos-related liabilities from exposure present a financial risk for companies formerly operating in the asbestos industry and their various stakeholders. Mandated disclosures focus on the financialisation of risk by estimating future claims using a plethora of variables. Additionally, the rules of consolidation provide aggregated and disparate data for comparison. Voluntary disclosures have the potential to provide an alternative way of exploring the particular nuances and effects of corporate exploitation of asbestos in society, particularly in times of economic downturn.

To explore the potential of bringing together corporate and 'other voices' on the asbestos issue Chapter 5 reports on an empirical 'social accounting' exercise in the form of 'silent' and 'shadow' reporting and shows that this exercise reveals significant gaps in disclosure between what these companies disclose in relation to asbestos, and what is reported in the media. These findings reinforce the widely held belief that corporate disclosures or 'accounts' suffer from limitations in that they provide only a partial picture of an entity's impact on society.

The next chapter, Chapter 4, outlines the background and history of social accounting. It also provides details of the method employed for undertaking the empirical 'social accounting' exercise.

4. Silent and shadow reporting

The concept of 'giving an account' is premised on a broad notion of accountability. To whom and why one is to account is dependent on the framework of accountability. These accountability frameworks define the aims and objectives of 'the account' as well as identifying the quantitative and qualitative characteristics of what constitutes a 'good' account. Social and environmental accounting (SEA) (eg corporate social responsibility reporting, sustainability reporting, social audit and the social report) is generally perceived as a challenge to the conventional financial economic accounts that reflect the interests of shareholders (Gallhofer and Haslam 2003). The environmental aspect of organisational performance has traditionally dominated SEA disclosures (Ball and Seal 2005) and will probably continue to do so in the face of climate change and a carbon-constrained economy.

Despite the lack of widespread attention given to corporate (or organisational) accountability for the social aspects of its performance, it is of paramount importance to many stakeholders. In the 1970s, Medawar (1976: 393) defined social accountability as 'a process in which those corporate bodies, with decision-making powers, propose, explain and justify the use of those powers to those without'. Social accounting provides a means to achieve this form of stakeholder democracy and has been captured under the umbrella of 'the universe of all possible accounting' (Gray et al. 1997: 328). Social accounting is premised on the notions of justice, community and fairness in the allocation of resources and involves the preparation, presentation and reporting of information about 'social' factors or conditions and the 'social account' as a contrast to often competing 'economic factors and values' (Ball and Seal 2005: 455).

An organisation's attempt to discharge accountability, whether in the form of accounting for financial or non-financial performance, emanates from a perception that stakeholders have an explicit or implicit right to an account. Regulated and mandated accounting disclosures prescribed by standard setters such as the IASB and FASB identify a range of users and their information requirements: most notably, those that relate to investment decision making. Information suitable for the purpose of this financial accountability is said to have the characteristics of relevance and reliability. These qualitative characteristics are operationalised through the preparer's discretion over terms such as probability, materiality and reliable measurement. In addition to regulated accounting disclosures, companies often systematically disclose unregulated information of a social nature.

The issue with corporate disclosure is that the information is largely within the control of the reporting entity. A long tradition of academic research has demonstrated the biased nature of regulated financial reporting. Bias occurs through such methods as choice of accounting standards and ambiguous terminology, and is exacerbated by the politicisation of the standard-setting process (see Zeff 1978; Young 1994). The bias in reporting is inherently directed toward those stakeholders that have the power to impose 'financial hegemony' (Owen et al. 2001), often at the expense of the diverse and competing range of interests of other corporate stakeholders. Notwithstanding this, academic researchers make use of financial reports as primary data for 'unmask[ing] undesirable, irrational or socially irresponsible corporate behaviour' (Shaoul 1998: 237). In practice, discharging corporate social accountability through mandatory disclosure requirements is said to be problematic, incomplete and unreliable.

Corporate disclosure of voluntary social information has arisen from the need to satisfy a range of stakeholders through 'new forms of accounting' to 'heighten organisational transparency' (Owen et al. 2001: 272). In the area of voluntary disclosure, however, the discretion of the reporting entity to define terms and decide information importance is almost boundless and the information selective and unreliable (Dey 2003). The recognition of a range of public interests requires a level of engagement and dialogue with diverse groups of stakeholders (Gray 1997) to discharge stakeholder accountability and enhance democracy (O'Dwyer 2004). Nonetheless, the identification of multiple and heterogeneous interests poses another question: how does one create an organisational social account to address the diversity of known and unknown stakeholder concerns and needs?

The social account is predicated on the assumption that mainstream or conventional accounting is somehow deficient in reflecting 'everything that matters to society or to various key groups within society' (Gallhofer and Haslam 2003: 112). While corporations have always produced a range of social information, whether in the annual report as 'nuggets of environmental and social data' or in other communications (Gray 1997: 204), the rise of the stand-alone social account is a relatively new phenomenon. While there have been some notable attempts, eg The Body Shop, to provide a social account as a 'value-shift' away from the 'bottom line' (Zadek et al. 1997: 20), many have been described as merely a public relations exercise. Managerialist sceptics argue that management will disclose SEA information only to maintain viability to 'survive and prosper' (Zadek et al. 1997: 20). Silent and shadow reporting has emerged as a mode of 'counter account' in the form of an academically informed and researched social account. These reports are externally generated using comparative frameworks aligned to the interests of identified stakeholders (O'Dwyer 2004). Silent and shadow reports are said to shift accountability from an institutionally centred framework to a more democratic form of stakeholder accountability (O'Dwyer 2004); to present opportunities for dialogue between an institution and its stakeholders; and to promote emancipatory potential through education and empowerment (Dey 2003).

4.1 THE RISE OF THE EXTERNAL SOCIAL ACCOUNT

The engagement process for identifying the informational requirements of various stakeholders has been criticised as a form of stakeholder management (O'Dwyer 2004) and internally generated corporate information of a social nature often results in a gap between what is promised and what is delivered (Dey 2007). The plethora of social publicly available information from sources both internal and external to the entity has the potential to provide the basis for counter-narratives as alternative unofficial accounts (Dey 2007), or 'problematizing external accounts' (Thomson et al. 2010: 5). Once identified, this gap can be exploited to problematise and produce a critique of corporate conduct with a view to altering extant practice (Thomson et al. 2010) and public opinion. Counter-accounts challenge the official corporate disclosures as 'information and reporting systems employed by groups such as campaigners and activists with a view to promoting their causes or countering or challenging the prevailing official and hegemonic position' (Gallhofer et al. 2006: 682). While these disclosures from various parties external to the organisation are also subjective, biased and partisan, they act as

a 'balancing view in the face of the considerable resources that organisations have at their disposal' (Gibson et al. 2001c: 1).

Externally produced alternative accounts have been documented since the 1970s from various sources. One of the most prolific producers of anti-reports was Counter Information Services (CIS), a collective of journalists who sought and published information reported by the mainstream media on social institutions, including corporations, and issues that governed the daily life of citizens worldwide. The following categories of 'gaps' have been identified that the social account attempts to address: a praxis gap between official reports and stakeholder accounts of their perceived reality; a reporting gap between official reports and the information usefulness for a defined stakeholder group; a truth gap that exists where companies actively withhold knowledge or are deceitful in claims; and a potential gap that identifies ex ante a future social or environmental problem (see Appendix 1 for a list of examples).

Praxis gap

One of the earlier attempts to produce a counter-account was performed by Social Audit Limited (1976) on the Avon Rubber Co. Ltd; it identified a praxis gap between the company's stated employee policy and the perceived reality for the workforce. This report was compiled in collaboration with company management and trade union representatives as a process of learning. A report produced jointly by Oxfam and Unilever was also an example of a cooperative project to 'bring together very different world views' so as to question the assumption that foreign direct investment mitigates poverty (Oxfam 2005: 106) and identify whether a gap between policy claims and practice existed.

Counter-accounts are often adversarial rather than cooperative. In the 1970s, Unilever was also criticised by CIS (1975b) as exploiting a captive workforce in the UK while spouting the corporate rhetoric of benevolence. The Christian Aid (2004) counter-account of three multinational companies (MNCs), Shell, British American Tobacco and Coca Cola, asserts that the reporting on corporate social responsibility is merely corporate spin and an exercise in public relations. That report identifies a praxis gap between the claims of the three MNCs and the lived reality of communities affected by corporate operations in the areas of human rights and environmental abuses. Similarly, Friends of the Earth (2003) identified a praxis gap between the impact of Shell's operations on communities and the company's claims to sustainable environmental and social practices. A more recent report by Christian Aid (2008) investigated a praxis gap between the creation of tax regimes to encourage extractive industries in developing countries and the attainment of the Millennium Development Goals (MDGs), on which such regimes have had a negative impact.

Reporting gap

Adams (2004) first offered the notion of a reporting-performance gap following a study on the extent to which a company, Alpha (fictitious name), had disclosed its ethical, social and environmental performance compared with information on its performance from other sources. The gaps in reporting were used as an indicator of the extent of accountability discharged. In line with this notion of a reporting gap, CIS had previously highlighted the inadequacy of corporate profit disclosures for indicating Ford's failing market share and its impact on workers (1973a); the inability of Rio Tinto Zinc's official reports to identify the

exploitation of money, resources and labour in developing countries (CIS 1973b); the exploitation of South African labour by Consolidated Gold Fields (CIS 1972); the dependency on oil producers (CIS 1974); and the rationalisation of staff at Lucas Industries (CIS 1975a).

Truth gap

A truth gap exists where companies actively withhold knowledge or are deceitful in claims. CIS (1973c) adopted a truth gap approach to investigate the rhetoric of staff rationalisation at GEC in the 1970s. Action on Smoking and Health's report (ASH 2002), paralleling the 2001 Social Report by British American Tobacco (BAT), also identified a 'truth' gap. ASH's critique went further than just highlighting omissions or disclosure gaps by accusing BAT of deceit in its claims and processes for conducting business; '[w]e judge BAT by how it behaves, its business practices, the directions it takes and its truthfulness' (ASH 2002: 1). Greenpeace (2005) also identified a truth gap in its counter-account of Esso's and Ford's contributions to climate change. The corporate assurances of a commitment to changes in technology were challenged as being no more than mere corporate rhetoric to obstruct legislative and regulatory regimes.

Potential gap

A potential gap exists where a future social or environmental problem is identified in a counter-account (Friends of the Earth 2002). The Friends of the Earth's *AMEC Counter Report* (2002) provided an ex ante account to AMEC's Sustainability Report on the potential negative social and environmental impacts expected from the proposed construction of the Baku-Tbilisi-Ceyhan oil pipeline in Turkey.

Cooper et al. (2005) argue that, to have an impact, social accounts should be produced outside the market mechanism; be informed theoretically; and be linked to current social groups and struggles. Shaoul (1998: 246) argues that the 'concepts and practices of conventional accounting are reflections of the social relations of capitalism' and serve as a mirror for critique. Extant corporate accounts demonstrate the impact of operations and practices on a variety of stakeholders and are under-used in the area of social accountability. As Medawar (1976: 394) explains, accountants and academics can still provide an independent point of view and, although it may never be definitive, it 'will be almost bound to improve on the accounts that the average company will prepare on and by itself'. Silent and shadow reporting has emerged as a new mode of counter-account, combining both internal and external public information in the form of an academically informed and researched social accounting.

4.2 SILENT AND SHADOW REPORTING

The term silent social accounting was coined by Gray (1997) to demonstrate how information contained in a company's annual report can be constructed into a social and environmental report. This collation of 'nuggets' of disparate information provided 'a significant step on the road to the sort of fuller social account' (Gray 1997: 204). The UK company, Glaxo Holdings plc, was used as the first exemplar to demonstrate how a statement or report of aggregated social and environmental information had a far greater impact. The silent account also highlighted gaps or inadequate disclosures and provided the basis for the development of a systematic reporting framework. This idea has been expanded to include other corporate internally generated

public information from an organisation's formal information channels, eg annual reports and press releases (Dey 2007).

Shadow accounting is a 'technology that measures, creates, makes visible, represents and communicates evidence in a contested arena' and, as such, attempts 'to challenge, problematise and delegitimize those currently in a dominant position of power' (Thomson et al. 2010: 3). The shadow account builds on the counter-account and uses public information produced externally to and independently from the organisation to reveal internal contradictions or gaps between what was reported and what was suppressed (Thomson et al. 2010). Using external sources provides the potential to represent different voices and to re-narrate the corporate story from different actors (Thomson et al. 2010).

'Shadow accountability' arises from the production of shadow accounts (Thomson et al. 2010: 3) and makes visible the relationships between constituents that may or may not have been articulated in other accounts. Shadow accountability, by presenting alternative or partisan interests, can also expose power asymmetries and enable change in corporate conduct. If social accounts engage with or articulate a social movement, they have emancipatory potential or a public interest/social change function (Cooper et al. 2005).

Shadow accounts can be produced for a wide range of institutions and across a diverse range of actions. A shadow report for Barclay's Bank (Dummet 1982) is formatted similarly to the Bank's official reporting to shareholders, with the aim of filling the gap in Barclay's reporting of its own negative economic and political impact in Africa. The authors constituted a shadow board of directors who reported to stakeholders on the Bank's role in sustaining apartheid. Ruffing (2007) also produced a shadow report of BP's *Sustainability Report* using media disclosures from the *Financial Times* to identify the selective use of GRI guidelines in BP's reporting. BP was chosen because the extractive industry is highly visible in its treatment of employees and its environmental performance.

The Centre for Social and Environmental Accounting Research (CSEAR) undertook a 'Silent Accounts Project' in 2001 to demonstrate an approach to silent and shadow accounting as a contribution to the 'broad process of "encouraging" organisations to develop their own accountability mechanisms' (Gibson et al. 2001c: 1). The UK companies, Tesco (Gibson et al. 2001d; 2001e) and HSBC (Gibson et al. 2001a; 2001b) were initially selected on the basis of their visibility, size and disclosure patterns along with the fact that they did not produce stand-alone social accounts. To prepare the silent report, publicly available, company-generated information was scrutinised for social and environmental data for the 1999/2000 reporting cycle to represent the 'company's own voice' (Gibson et al. 2001b: 2). The material for the shadow report was sourced entirely from publicly available, non-company media for the same period. In 2006, silent and shadow reports of Ryanair (Hamling et al. 2006/7) were published by CSEAR using a similar approach. Ryanair was chosen for its 'notable contemporary performance' (Hamling et al. 2006/7).

CSEAR's silent and shadow reports recommend a prescribed format, including the following headings:

- *Mission and policy statements*
- *Corporate governance statements*
- *Employment report*
- *Customers and products report*
- *Community report*
- *Environmental (inc. animal welfare) report*
- *References*

The 'CSEAR approach' is recognised as being theoretically informed and academically researched and provides the framework for the empirical work in this project.

4.3 METHOD

This project employs a discourse analysis approach to construct and analyse silent and shadow accounts for James Hardie and CSR. Discourse has been defined as 'an interrelated set of texts and practices of production, dissemination and reception that brings an object into being' (Parker quoted in Phillips and Hardy 2002: 3). Text is a 'discursive unit' (Phillips and Hardy 2002), or discourse embodied and enacted in text.

4.3.1 Document analysis

Silent and shadow reports rely on publicly available documentary evidence as data. Documents are considered to constitute language in use as they are naturally occurring, ie they occur in normal day-to-day activity rather than being research instigated (Phillips and Hardy 2002). Documents serve as receptacles of content and as functioning agents that mediate relationships in society (Prior 2004) because the production of a document structures 'facts' and 'identities', makes things visible, and marks the realm and expertise of various parties (Prior 2004). Documents, therefore, have implications for social action (Berg quoted in Prior 2003) and their very existence or presence of a document can influence action. A structuring effect and mediating of social interaction is apparent in the manner in which they are circulated, accessed and used (Prior 2003).

The user of documents may harness the statements made in one setting and use them in another in a manner not foreseen by the author. This 'action at a distance' defines how documents take on a force and shape as if they were an actor in the social process. Documents also make things visible and are translated in differing ways, depending on the agent and how the document is integrated into the 'life-world' or network of everyday action (Prior 2003: 98). In this project, the documents have been selected as representative of both corporate and alternative voices on the issue of asbestos during a period of economic downturn. The researchers have used these documents for a reason not envisaged by their original authors and have extracted meaning from the context in which the text appears. The following section outlines the documentary evidence and the analytical framework used in the project.

4.3.2. Scope and documentary evidence

The two companies, James Hardie and CSR, comprise the units of analysis for the project. A silent and shadow report for each company was compiled using data sourced from publicly available information for the period 1 April 2009–31 March 2010. This period is consistent with the financial reporting cycle of both companies.

For the silent report, the data comprised company-produced information from the companies' comprehensive websites. The websites of both companies were interrogated. This required extracting information from all tabs within the websites and summarising what information was available to the public, including:

- press releases from each company
- all publications
- all financial results made available by the companies to the Australian Stock Exchange (ASX), shareholders and the public
- information available about the James Hardie and CSR annual general meetings
- details of all presentations by the board and senior staff of James Hardie
- asbestos compensation – the James Hardie website has a separate section on asbestos compensation with links to James Hardie documents, KPMG reports on financial provisions for compensation, and contact details for the Asbestos Injuries Compensation Fund
- CSR and society – information was compiled from the CSR website (from various tabs) in order to provide a summary of how CSR sees itself interacting with, and being responsible towards, society.

The silent reports represent each company's 'own voice' and each is reported in context with quotes or close paraphrasing (CSEAR 2010b: 2). Both researchers initially scrutinised the documents for relevant material before compiling the silent report.

For the shadow reports, constructed, publicly available, externally produced information for the period under review was confined to commercial media, available in print or from websites. Commercial media provide date-accurate information and permit adequate scoping of the project to provide comparative period-relevant information. A search of the major commercial media in Australia from 1 April 2009 to 31 March 2010 was conducted. As many media outlets are syndicated and share the same content, a wide range of publications were captured using the search terms 'James Hardie' and 'CSR Ltd'. The major news channels were ABC News; *Brisbane Courier Mail* and associated newspapers: *Herald Sun*, *Daily Telegraph*, *The Australian*, *Perth Now*, *Sydney Morning Herald*, *Melbourne Age* and the *Australian Financial Review*. The data sources are representative of the public perceptions of James Hardie and CSR as captured in the media.

CSEAR adopts a particular approach to organising an existing set of public information into a formalised report. The intent is not to show companies in a biased manner or in 'a good light' or a 'bad light' (Gibson et al. 2001c, p.3; Hamling et al. 2006/7: 2). The silent report uses the company's own disclosures and, hence, the inclusion of researcher bias is mitigated. Researcher bias, however, is more prevalent in the shadow report and, to ameliorate this bias, information was gathered from a large database of media sources. The researchers scrutinised the articles and selected information directly related to asbestos and

the economic downturn. To mitigate editorial bias in the selection process, the information selected has been quoted or closely paraphrased in the compiling of the shadow report. In addition, the researchers attempted to provide both the 'good news' and 'bad news' as reported (CSEAR 2010b: 3–4). Where the source of information was unequivocally identified as company produced it was excluded. Nonetheless, media information is often 'placed' by companies and, as a result, some information in the shadow report may be company produced (CSEAR 2010b: 3–4).

The silent and shadow reports (see Appendices 2 to 5 inclusive) were compiled using the categories described by the CSEAR approach. The sub-categories used in both the silent and shadow reports were chosen specifically for James Hardie and CSR to enable the researchers to align the content of the company's silent and shadow reports with the asbestos issues and challenges. Owing to the paraphrasing and use of direct quotes, the reports represent a mixture of past, present and future information. This is more prevalent in the shadow reports, where time-sensitive data is used. On the other hand, the data for the silent reports is already-collated and aggregated annual historical data from annual reports.

The intra-company comparisons and analyses of the silent and shadow reports for James Hardie and CSR are presented in the following chapter. This comparison identifies 'gaps' between the corporate narrative and the alternative narrative according to the following categories:

- praxis gaps
- reporting gaps
- truth gaps
- potential gaps.

Following this, the inter-company comparison highlights the different disclosure issues for each company. While each company shares the same regulatory and jurisdictional background, they have followed different trajectories in relation to asbestos.

4.4 SUMMARY

This chapter has reviewed the various forms of social accounting ranging from corporate stand-alone disclosures of social and environmental information to reports produced externally as counter-narratives to a corporate report. Silent reporting has developed from the concept that companies already produce a certain amount of social and environmental information publicly through various media. Shadow reports are premised on the concept of the counter-narrative or stakeholder perspective of a company's social and environmental performance. As a framework for supporting academically informed research, the silent report still represents the 'corporate voice', albeit from an external perspective, while the shadow report represents an alternative narrative as a polyglot of 'other voices'. The compilation and production of silent and shadow reports allows comparison across these narratives; and, importantly, the identification of 'gaps' from which insights into corporate claims and accountability can be gained. These are discussed in the following chapter.

5. Social accounting in times of economic downturn

This project adopts the method of silent and shadow reporting consistent with the 'CSEAR approach'. Rather than providing comprehensive social and environmental information, however, this project has adapted the reporting framework to focus attention exclusively on the issue of asbestos and corporate accountability in the context of economic downturn. The issue of asbestos appeared in all the reporting categories defined in the CSEAR approach and demonstrates the pervasive nature of asbestos among corporate entities involved in the industry.

The process of silent and shadow reporting has several potential outcomes: the re-presentation of disparate 'nuggets' of data in an accessible form; the identification of 'gaps' in corporate disclosures; and a cohesive forum for alternative voices. The gaps arise from the absence of a holistic narrative on social and environmental issues (silent reports), or an absence or bias in disclosure (shadow report). Shadow reports can also function to challenge or delegitimize the dominant narrative produced by corporate disclosures by using different voices to re-narrate the corporate story (Thomson et al. 2010). Shadow accountability is achieved by making visible the relationships between the corporate entity and alternative interests (Thomson et al. 2010).

This chapter draws on the silent and shadow reports for James Hardie (Appendices 2 and 3) and CSR (Appendices 4 and 5).³⁴ The silent and shadow reports provide a framework for analysis and discussion from two perspectives:

1. intra-company comparison of the silent and shadow reports of James Hardie and CSR to identify gaps in disclosures on asbestos, and
2. inter-company comparison of these gaps between James Hardie and CSR.

The intra-company comparison is categorised according to the gaps identified in Chapter 4:

- a *praxis gap* is identified where a corporate policy or objective is inconsistent with the actual conduct of the corporation
- a *reporting gap* is identified where the corporate disclosures are inconsistent with the information derived from external sources; inconsistencies can arise from the rules regarding mandatory or voluntary disclosures and the perceived 'usefulness' of information for stakeholders
- a *truth gap* is identified where companies are deceitful in their claims or withhold knowledge
- a *potential gap* is identified where companies avoid disclosing future or potential outcomes from current decisions.

The inter-company comparison analyses these differences in the context of the economic downturn.

5.1 INTRA-COMPANY ANALYSIS OF JAMES HARDIE INDUSTRIES SE

The silent and shadow report for James Hardie covered a period of considerable public interest in asbestos issues and corporate activity (see Figure 5.1).

While the reports provide a 'snapshot' for James Hardie for a defined period, many of the issues arise from James Hardie's past activities. The shadow report, compiled from media information, was not confined to the temporal boundaries of corporate reporting and contains more detail of the activities and operations outside the reporting cycle. The major events that occurred in relation to James Hardie that involved asbestos are summarised in the timeline presented in Figure 5.1 opposite.

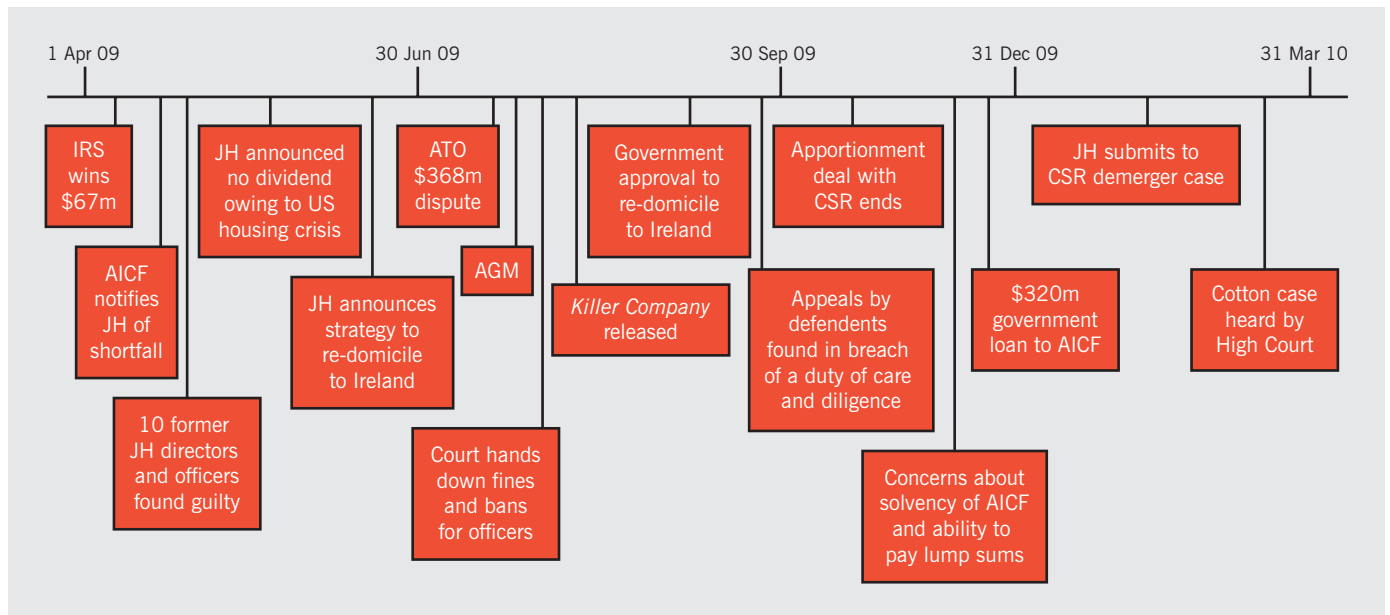
The reporting cycle began with the first quarter news that James Hardie had success in a case against the US Internal Revenue Service over taxation benefits under the Netherlands tax treaty. Although tangential to asbestos, the redomicile to the Netherlands in 2001 was predicated on favourable tax treatments that were not fully realised. The less than favourable treatment was one of the reasons James Hardie sought approval to redomicile to Ireland later in the year. The reporting year also began with the AICF notification of the pending shortfall of funds to compensate asbestos litigants after a further two years. James Hardie announced that, owing to the economic downturn and the AFFA rules of funding, it would not contribute to the AICF. Shortly after, James Hardie, citing the US housing downturn as a cause, announced that dividends would not be paid in that year. Also, in the first quarter, ten former James Hardie directors and officers and the company were found guilty of civil breaches of the *Corporations Act 2001* in a case brought by the Australian Securities and Investment Commission (ASIC). The case involved, among other breaches, the issuance of misleading statements that the former asbestos compensation fund established by James Hardie, the MRCF, was 'fully funded'.

In the second quarter, the Court handed down the fines and bans from directorship for former directors and officers found guilty in the ASIC case and seven of the ten defendants lodged appeals. Two former directors resigned from other high-profile boards in the wake of the ASIC proceedings. An AU\$368m dispute with the Australian Tax Office began during the period and was cited as another financial hardship for James Hardie and its ability to fund dividends and the AICF. The plans to redomicile to Ireland were approved by the government and shareholders. In the event, the final process of approval required from employees, under European Union (EU) laws, delayed the move to Ireland. In the midst of these activities, the book *Killer Company* (Peacock 2009) by an investigative journalist, Matt Peacock, was published, raising new concerns about the level of environmental asbestos contamination.

During the third quarter, the AICF, in light of the concerns about solvency, indicated the prospect that compensation for asbestos litigants and their families might be paid in instalments rather than as lump sums. This new development in a looming solvency crisis of the AICF prompted the New South Wales (NSW) and Australian governments to agree to a AU\$320m loan facility to fund the AICF. In the final quarter, the application by CSR Limited to the courts for permission to restructure was the newsworthy item. The restructuring and corporate redomiciling of James

34. For ease of reading in this section references to the silent and shadow reports have been omitted. Unless a specific reference is given, all material is drawn from the silent and shadow reports in Appendices 2 – 5.

Figure 5.1 Timeline of events at James Hardie



Hardie in 2001 was an oft-cited example for the potential plight of CSR's asbestos litigants (see section 5.2 below). James Hardie and CSR were in a joint asbestos manufacturing partnership for a period of time in the 1960s and 1970s and had a co-defendant agreement regarding the apportionment of claims. As the agreement had been terminated during the previous year, this partnership became central because, in the event of an insolvent CSR, funding of any claims from this period would fall on the AICF and, indirectly, on James Hardie.

At the end of the reporting cycle, the High Court ruled in the 'Cotton case' in favour of James Hardie, overturning a watershed case, involving liability for a former worker's death from lung cancer. The court ruled that, where a plaintiff is also a smoker, it is impossible to definitively link asbestos exposure with lung cancer.

In addition to forming the basis for analysis, the silent and shadow reports for James Hardie and CSR are also stand-alone documents and presented as appendices to this report. The shadow report is more comprehensive than the silent report for a number of reasons including:

- that the silent report is primarily a collation from information already aggregated and summarised, eg annual reports, whereas the shadow report is compiled from a wide selection of media reports
- the number of primary sources of evidence used for the shadow report
- that the primary data for the shadow report consist of narrative disclosures reiterating past, current and future events whereas the silent report uses data that primarily adhere to a time-period principle
- that the shadow report draws on material that follows the genre and style of journalistic reporting, whereas the silent report draws on material that uses standardised pro-forma reporting.

5.1.1 Identifying the gaps

The gaps in James Hardie's silent and shadow reports arise from both omissions of information and differences between the items of information that are presented.

The silent report is more informative in limited areas including the following.

- There is potential for payments of litigation claims beyond the terms of the AFFA, including claims against the former parent company and non-Australian claimants. James Hardie has reported on this risk through the 20F filing for US listing and the requirement to disclose future financial risks.
- There is information on technical aspects of funding arrangements of the AICF, including: actuarial assumptions and sensitivity analyses; the definition of 'free cash flows'; non-monetary restrictions on transactions that affect the relative priority of AICF; and the calculations for the annual payment.
- A reason is given for inclusion of the line item 'Asbestos Liability' (consolidation of the AICF due to pecuniary interest) and the impact on the financial accounts of changes to the amount of the asbestos liability is disclosed.

The shadow report is more informative in the following areas

- There is considerable information supplied about the reorganisation in 2001 and the Jackson Inquiry throughout the asbestos narrative in relation to the events during the reporting period and the former efforts 'to cut asbestos ties'.
- The moral dimension of corporate behaviour and the moral obligation James Hardie has to asbestos claimants both current and future is often referred to in the shadow report. The saga has been about 'moral obligations', which is called 'corporate social responsibility' in the business world.

- The social impact of James Hardie on the asbestos community is reiterated and reinforced with personal ‘stories’ of asbestos-related disease sufferers throughout the shadow report.
- The proposal for the AICF to pay by instalments instead of lump sum payments to asbestos claimants is canvassed.
- Average claim settlements and other less-aggregated claims data are revealed.
- The movement of the James Hardie share price and market sentiment toward James Hardie are discussed. In the shadow report the share price is linked explicitly to ‘good’ and ‘bad’ news about the ability to make payments to the AICF, eg ‘shares slumped 15c’ following the bans and fines on the former directors and officers.
- The reasons for and process of redomiciling to Ireland are explained, including the specifics of the US-Netherlands tax treaty and the closure of the tax loophole and the requirement that executives become Dutch residents.
- The consequences of the judgement against the ten former directors and officers are discussed, including the effect on their current board memberships and careers (two resigned from high profile boards), as well as the broader consequences for non-executive directors in terms of due diligence and corporate strategy.
- The current Australian Tax Office AU\$368m dispute over asset transfers from the ‘Project Chelsea’ reorganisation in 1998 and the AU\$67m US tax dispute over changes to the US-Netherlands tax treaty in 2006 are covered.
- The requirement for European employees’ approval to redomicile to Ireland and the subsequent delay to the move are discussed.
- The indigenous communities affected by asbestos contamination are specifically acknowledged.
- The ‘Cotton’ case and the High Court decision regarding lung cancer, smoking and asbestos are discussed.
- The cancellation of the 10-year arrangement to fund asbestos claims jointly with CSR is highlighted.

For the reporting period, James Hardie was a company with two public profiles. It was the company renowned for the continuing toxic effects of its asbestos products and attempts to jettison this legacy in one of the greatest corporate scandals in Australia; and it had an image as part of an investor’s ‘dream’ portfolio. The GFC, the US housing crisis, the redomicile to Ireland and the rise of the Australian dollar compounded to make the economic downturn a particularly potent issue for the company. Despite these economic impediments, however, James Hardie surprised the market with its full-year results. Nonetheless, the rise and fall of James Hardie’s economic performance and corporate restructurings sent ‘ripples’ of anxiety through the community about the continuing viability of the AICF. James Hardie needs to remain ‘profitable’.

Table 5.1 summarises an example from these reports according to each ‘gap type’. These categories are used for analytical purposes and both the examples and the other gaps identified in the following section may show the characteristics of more than one category.

Table 5.1: Example of reporting gaps by James Hardie

<p>Praxis gap</p> <p><i>Dividend policy</i></p>	<p>Claims that dividends not declared or paid owing to uncertainty in market and global conditions and ‘company-specific contingencies dissipated’.</p>
<p>Reporting gap</p> <p><i>Use of alternative metrics for internal strategic decision-making, performance and forecasting.</i></p>	<p>James Hardie uses non-GAAP financial measures that exclude asbestos for internal strategic decision making and forecasting. The shadow report uses the externally reported figures that include the asbestos liabilities.</p>
<p>Truth gap</p> <p><i>Terms of the AFFA prevents James Hardie from making payments to the AICF</i></p>	<p>Technical and legal rationale for not funding AICF is given whereas the shadow report indicates that James Hardie uses a ‘legal loophole’.</p>
<p>Potential gap</p> <p><i>JHISE ‘exposure’ to asbestos liabilities beyond AFFA and AICF.</i></p>	<p>The AICF only consolidates two former subsidiaries not the former parent company resulting in the potential for litigation against the former parent due to shareholdings in overseas asbestos operations. In addition, AICF only funds Australian claims and there is a residual risk from claims from James Hardie products outside Australia. The shadow report highlights the effects of the reorganisation strategy and its effect on potential claimants.</p>

5.1.2 What the gaps reveal

A *praxis gap* is identified where a corporate policy or objective is inconsistent with the actual conduct of the corporation.

- James Hardie did not pay dividends during the reporting period owing to the ‘uncertainty’ surrounding ‘industry trends’ and ‘company-specific contingencies’. The shadow report questions the announcement as being relatively ‘politically palatable’ given that the lack of ‘cash flows’ has restricted payments to the AICF.
- The stated objective of James Hardie is to fund the AICF according to the terms of the AFFA to ensure the ‘long term financial success of James Hardie’. The shadow report demonstrates that stakeholders recognise that the AFFA is designed ‘not [to] threaten the insolvency of the company’ and that ‘insolvency is in no-one’s interest’. Nonetheless, as the shadow report asserts, the government will be ensuring that James Hardie’s obligations are met. The redomiciling to Ireland is also seen as a ‘complex and costly distraction’ for James Hardie that further threatens the viability of the AICF.

A *reporting gap* is identified where the corporate disclosures are inconsistent with the information derived from external sources. Inconsistencies can arise from the rules regarding mandatory or voluntary disclosures and the perceived ‘usefulness’ of information from stakeholders. The following are examples of a reporting gap.

- Different metrics and measurements are included in both the silent and shadow reports. James Hardie uses non-GAAP financial measures that exclude asbestos for internal strategic decision making and forecasting. For James Hardie, the AICF funding restricts funds available for strategic operations and the ability to access credit and capital markets. The shadow report uses the externally reported figures, which include the asbestos liabilities in most cases, to explain James Hardie’s lack of ability to fund AICF in the reporting period. In addition, non-GAAP measures are used to explain James Hardie’s relative success in the market, despite the effects of asbestos liabilities on reported results and the US housing crisis. Concern is raised in the shadow report about the use of ‘underlying profit’ rather than the ‘official numbers’ as the latter represent a ‘clearer and usually better story’.
- The silent report indicates that James Hardie’s inability to fund the AICF is based on restrictive covenants that prevent any disbursement beyond the terms of the AFFA. The reason is both contractual and unequivocal. The shadow report supports the notion that the funding requirement is linked to the AFFA arrangements, but there is considerable ambiguity surrounding the term ‘free cash flow’. James Hardie acknowledges that it is linked to the ‘ability to generate net operating cash flow’, but the media often report ‘operating cash flow’ and ‘operating profits’ to indicate the underlying accounting component of the calculation.
- There is considerable discussion in the shadow report about the possibility that the AICF might fund claims by instalments and the negative social consequences of this, the ‘financial drip feed’, if used to forestall pending insolvency. For James Hardie the shortfall could result in ‘negative publicity’ and ‘adverse’ financial consequences; for the ‘victims’ it would

‘just add worry and stress’ if their families and loved ones were financially insecure at the time of their death.

- The reporting of asbestos claims and settlements varies between the silent and shadow report as the silent report presents aggregated full-year data and the shadow report presents quarterly information. The shadow report reveals that while sales are falling, asbestos claims are rising whereas the silent report presents a less-than-predicted quantity and amount. The shadow report also reveals a AU\$4.1m payment which is ‘thought to be the largest’ in Australia.
- During the reporting period there was considerable media coverage of the CSR demerger proposal, the role James Hardie played in the court’s ruling and the consequences for the AICF if CSR failed to fund asbestos litigation adequately. The CSR demerger and James Hardie’s involvement in the decision is given scant attention in the silent report.

A *truth gap* is identified where companies are deceitful in their claims or withhold knowledge. The issue of ‘deceit’ and the intention to ‘withhold’ is subjective and this notion of truth is reflected in the narrative in the shadow report.

- The silent report gives the technical and legal rationale for not funding AICF whereas the shadow report indicates that James Hardie uses a ‘legal loophole’ to abrogate its responsibilities to asbestos sufferers.
- The announcement that within two years the assets of the AICF are likely ‘to be insufficient to fund’ liabilities is reported in the shadow report as an attempt to ‘divert attention from the Supreme Court finding’ in the ASIC case against the former directors and officers. There is a perception that there is ‘plenty of money’.
- The redomiciling to Ireland created significant media interest, especially since the tax-related arguments for the move reflect the tax-related rationale for the 2001 corporate reorganisation. While the silent report reveals that the move will provide ‘medium-term and long-term benefits for the AICF’, it will reduce the ‘contribution for 2011’. The shadow report questions how the costs (\$64–\$94m), which will further ‘eat into the profits needed to pay the AICF’, can be justified, especially since the AICF is ‘running out of money’ and James Hardie has already ‘flagged’ no payment in 2010. The move is seen as ‘corporate greed’ that threatens ‘payments to asbestos victims’ while ‘refusing to freeze salaries’ of executives in difficult times.
- James Hardie is accused of going to extraordinary lengths to avoid victims’ compensation because they are ‘no more than a line on a balance sheet’ not real people. The silent report disclosure narrative is represented in financial terms and detailed explanation of the actuarial assumptions, whereas the shadow report questions the way that ‘contingent asbestos liabilities’, despite the incapability of quantification, are represented by detailed actuarial reports. This quantification has resulted from its ‘bungled attempts to cut ties with its asbestos past’.
- Allegations of collusion between CSR and James Hardie to influence ‘public debate’ and ‘regulatory authorities’ are

revealed in the shadow report. Activities such as not branding products and cutting asbestos dust from television commercials emerged in a court case concerning a claimant who contracted mesothelioma after visiting building sites with his father.

A *potential gap* is identified where companies avoid disclosing future or potential outcomes from current decisions. The potential gaps in reporting here included the following items.

- The majority of asbestos claims for James Hardie will arise from the operations of the former subsidiaries and will be funded from the AICF. The silent report focuses on 'other' potential litigants. The claims covered by the AICF and the 'robust and flexible' AFFA are reported as unproblematic by James Hardie, but the shadow report reveals that issues such as the corporate veil and the corporate reorganisation in 2001 have protected the 'rogue' company, James Hardie, from its responsibilities in the past and will do so in the future.
- The 'third wave' of asbestos claims is highlighted throughout the shadow report; these will come from future claimants: the 'end-users', 'children and families' who will require funding from the AICF. The redomiciling to Ireland provokes the comment that there is 'something different about asbestos liabilities' where companies can restructure 'without regard to the rights of people yet to fall ill from exposure to asbestos'. As stated, the 'poor buggers' in the industrial side will 'all be dead in another 10, 15 years', but the home renovators, the young people and their kids who are now being exposed are the future claimants.
- A landmark payment to a grandmother for unpaid wages as a carer is revealed in the shadow report as 'opening the way' for other wives and mothers of victims contracting mesothelioma from incidental exposure to claim carer compensation payments.
- There may be potential for James Hardie to move its domicile to the US to 'seek Chapter 11 bankruptcy protection' (see page 7), especially in the environment where other 'big asbestos mining and manufacturing' operations have liquidated or are making 'derisory' payments.
- The publication of the book *Killer Company* (Peacock 2009) reveals environmental contamination from the use of hessian bags, which had been used for transporting asbestos, as carpet underlay and the use of asbestos as a 'cement' for driveways and paths. While the silent report reveals the appropriate accounting treatment for costs of environmental remediation, the shadow report alleges that James Hardie avoids the liability of cleaning up hazardous waste.

5.2 INTRA-COMPANY ANALYSIS OF CSR LIMITED

The year under review for CSR was dominated by issues concerning the structure of the company and how 'value' could be extracted in difficult economic conditions. CSR also has significant exposure to the US housing market from its building products division. The year began with CSR's release of its financial report with the 'market-expected' loss due to a significant write-down emanating from a particular business unit (glass), along with increased asbestos provisioning. The loss reported paved the way for CSR to announce plans to demerge its two major businesses, sugar and building products. It was expected that value would be

extracted as sugar prices were climbing and world demand had risen. This would allow the demerged entity to trade at a premium and release value to shareholders.

To improve the entity's debt position before the demerger, CSR undertook Australia's first Simultaneous Accelerated Renounceable Entitlement Offer (SAREO) to raise equity to pay down debt. This type of offer is meant to treat retail shareholders more equitably.

From the third quarter through to the end of the year under review, CSR was under a cloud owing to procedural issues relating to the demerger then going before the courts. James Hardie, the NSW government and the AICF were all allowed to present evidence before the court. In February 2010, the demerger process was stalled: the Federal Court stopped the shareholder vote, suggesting that the proposed demerger was inconsistent with public policy and commercial morality as it would leave asbestos victims with recourse to a smaller equity base against which to claim compensation.

The Cotton decision from the High Court of Australia was also important for CSR in relation to future asbestos claims brought by smokers with lung cancer.

The failed demerger process was given a reprieve, with leave granted to CSR to appeal. Despite the lack of resolution, the CEO Jerry Maycock confirmed his retirement. The major events are outlined in the timeline presented in Figure 5.2.

5.2.1 Identifying the gaps

All four gap categories were identified in a comparison of the silent report and the shadow report for CSR (see Appendices 4 and 5). Examples of each are provided in Table 5.2.

5.2.2 What the gaps reveal

CSR's year was dominated by the issue of the demerger of the sugar business from the building products business and how this potentially led to the creation of 'value' for shareholders. In the process of the demerger, however, CSR's asbestos liabilities were emphasised. This single issue of the demerged entity's ability to fund asbestos liabilities into the future clearly highlights the substantial gaps, and bias, in disclosure.

The praxis gap identified could be seen as an example of a counter-account. The statement from CSR that it has 'consistently and responsibly met asbestos liabilities' is juxtaposed with the media reports of how, in satisfying their claims, sick and dying asbestos victims are confronted with legal difficulties due to disputes over the sharing of liability payments between CSR and James Hardie. It demonstrates a disconnection between the company's rhetoric (this same statement was repeated in many company-instigated disclosures) and the lived experience of asbestos litigants.

Reports on the demerger proposal and its effect on asbestos liabilities proved a fertile source of examples of disclosure gaps. There was a reporting gap, as CSR maintained the rhetoric of a long history of a commitment to stakeholders 'with a relevant interest in the asbestos issue'. Ironically, it was a lack of commitment to stakeholders with an interest in the asbestos issue that saw CSR's bid to put the demerger proposal to shareholders challenged. Also, more interestingly, the challenge

Figure 5.2: Timeline of CSR events

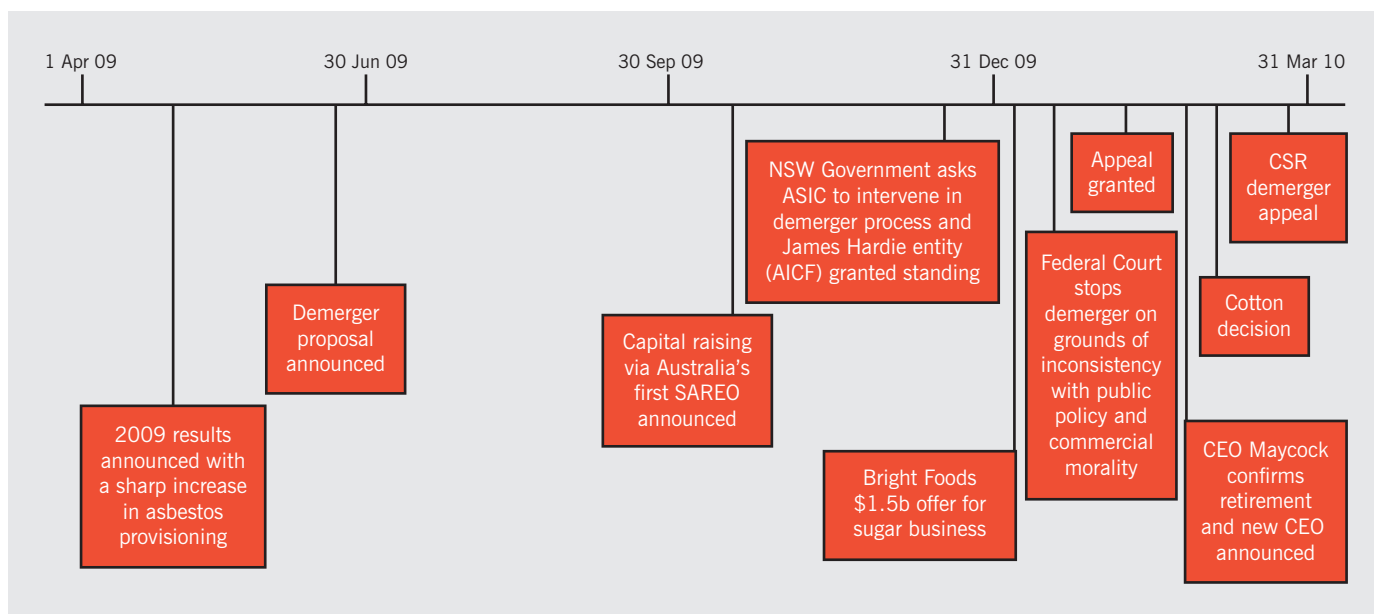


Table 5.2 Examples of disclosure gaps for CSR

<p>Praxis gap</p> <p><i>Disconnection between how litigants see the disposition asbestos claims and CSR's views on the process</i></p>	<p>'For more than 20 years, CSR has consistently and responsibly met asbestos liabilities. We pay claims where we have a demonstrated liability.'</p> <p>In contrast, litigants assert that '[c]ompensation claims to dying asbestos victims ...[are] being delayed by legal feuding between Australia's two asbestos manufacturers, James Hardie and CSR, over how they will share financial liability'.</p>
<p>Reporting gap</p> <p><i>Demerger proposal and stakeholder accountability</i></p>	<p>The silent report quotes CSR claims of a commitment to stakeholders, including those with a relevant interest in the asbestos issue. The shadow report highlights that the proposal presents a 'potential disadvantage to those with asbestos-related claims' and is inconsistent with 'public policy and commercial morality'.</p>
<p>Truth gap</p> <p><i>Provisioning for future asbestos liabilities</i></p>	<p>It is stated in the silent report that a provision of AU\$455.3m has been made for all known claims and reasonably foreseeable future claims. From the shadow report, KPMG as expert witness before the Federal Court recommended a provision of AU\$897m.</p>
<p>Potential gap</p> <p><i>Adequacy of assets available to fund asbestos liabilities in the future liabilities beyond AFFA and AICF.</i></p>	<p>In the silent report CSR's position is clear: 'We pay claims where we have a demonstrated liability and we maintain a provision on our balance sheet to cover all known claims and reasonably foreseeable future claims. We have never shirked our responsibility, nor have we ever attempted to ring-fence claims or limit the amount which is available to meet claims.'</p> <p>In fact, the shadow report revealed concern over the ability to meet future claims, after the demerger, from a reduced asset base: 'In its September accounts CSR said it had asbestos provisions of AU\$446.8m and 641 claims pending in Australia...This means its asbestos liabilities will account for about 20 per cent of its value [after the demerger]'.</p>

came from the NSW government, which requested the corporate watchdog, the Australian Securities and Investments Commission (ASIC) to review the demerger scheme documents being sent to shareholders in order to ensure that the disclosure of the effect of the asbestos liabilities on the demerged entity was appropriate. Reporting in the media and the judgment from the initial Federal Court approval process were clear: the proposal has a 'potential disadvantage to those with asbestos-related claims' and is inconsistent with 'public policy and commercial morality'.

The identification of a truth gap, while problematic and potentially inflammatory, is not difficult in cases where the central issue revolves around uncertainty and accounting estimates. In the case of asbestos, a truth gap is easily revealed where an estimate is presented as fact. While CSR (and other companies carrying liability estimates, such as insurance companies) disclose an actuarial estimate of all known claims and reasonably foreseeable future claims, the estimate can be challenged. In the furore around the demerger proposal, it was the AICF's actuary, KPMG, which contested CSR's asbestos provisioning. These actuaries, KPMG, are seen as authoritative in determining James Hardie's asbestos liability and, therefore, their estimate of AU\$897m provided a stark contrast to CSR's provision of AU\$455.3m suggesting that CSR may be deceitful in its claims as to the appropriateness of the asbestos provision.

Again, the demerger proposal provided evidence of a potential gap when contrasting the silent and shadow reports on CSR. CSR presented the position that the new entity would have the capacity to continue to fund asbestos claims from a smaller asset base. CSR's assertions were a concern for both the NSW government, which intervened in the demerger process, and asbestos groups alike, citing the James Hardie reorganisation and subsequent loan facility as an example of the difficulties that can arise when asbestos liabilities are isolated in a smaller company (or group). In particular, even if it were accepted that the provision was appropriate at AU\$455.3m, the asbestos provision represented 20% of the value of the 'new CSR'.

Several other issues became evident in the process of the silent and shadow reporting exercise for CSR. Most importantly, CSR's sustainability report did not mention asbestos. CSR's sustainability report is consistent with its financial reporting cycle and, as such, presents information relating primarily to the period of that cycle. While significant information is reported on policies and practices of a social and environmental nature, information on performance is limited to the reporting cycle demoting the asbestos legacy to an historical issue to be dealt with under the financial reporting framework.

The other issue of note regarding asbestos disclosures by CSR is the complete dehumanisation of the problem through quantification and factual disclosure. Claims, payments and estimates are presented factually in terms of numbers and the only allusion to the harm caused through the company's previous asbestos operations is also presented dispassionately:

CSR Limited and/or certain subsidiaries (CSR) were involved in mining asbestos and manufacturing and marketing products containing asbestos in Australia, and exporting asbestos to the United States. As a result of these activities, CSR has been named as a defendant in litigation in Australia

and the United States. At 31 March 2010, a provision of AU\$455.3m (2009: AU\$455.1m) has been made for all known claims and reasonably foreseeable future claims (CSR 2010a: 35).

And:

In Australia, asbestos related personal injury claims have been made by employees and ex-employees of CSR, by others such as contractors and transporters and by users of products containing asbestos. (CSR 2010a: 59).

This style of disclosure highlights the deficiencies in the ability of mandated disclosures to provide accountability beyond financial accountability through the lack of visibility of the connectedness of important constituents – asbestos claimants – to the disclosures.

5.3 INTER-COMPANY ANALYSIS

The silent reports present information from discrete company-generated sources and provide a separate 'story'. The shadow reports drew on the same media sources for company-relevant asbestos-related information and demonstrate similar stakeholder perspectives and a shared 'story'.

The inter-company comparison of the silent and shadow reports is instructive in a number of ways. The silent reports reveal many similarities and contrasts in the corporate 'story'. While similarities were expected under what is primarily a mandatory disclosure regime, it was the stark contrast in the manifest disclosures on asbestos issues that was unexpected. Notwithstanding the separate issues emerging from the shadow reports, they disclose an intertwined narrative between James Hardie and CSR that is absent from the silent reports.

5.3.1 Silent reporting

The silent reports for James Hardie and CSR demonstrate extensive disclosures around asbestos liabilities. Both companies justify the quantification of future liabilities, including the variables, critical assumptions, and expert actuarial assessments. These disclosures focus on explaining the liability 'figure'. James Hardie, having extended reporting requirements to satisfy its US reporting obligations, is required to include forward-looking risk indicators and extended narrative disclosure. Both companies include the use of 'underlying metrics' to report profitability, financial position and cash flows, less the effects of asbestos liabilities. These metrics convey a reliability and usefulness that is compromised by the inclusion of 'soft' actuarial estimates.

The main point of difference is the pervasiveness of James Hardie's asbestos disclosures, necessitated by their public profile, former corporate strategies and the current relationship with the AICF. CSR disclosure is limited and the asbestos liability is generally referred to as the line item 'product liability'. James Hardie's accounting treatment of asbestos liabilities is more complex and detailed because of the inclusion of the AICF in its consolidated financial statements. The disclosure presents nuances and ambiguities that require justification and detailed explanation, notwithstanding, for example, the losses from foreign currency translation.

5.3.2 Shadow reporting

The major revelation from the shadow reports is the interconnectedness of James Hardie and CSR in the public domain. James Hardie's attempts to isolate asbestos liabilities and its reputation as the 'perennial bad guy' negatively affected CSR's demerger proposal. Despite CSR's public profile as a 'good corporate citizen' with a long history of responsibility managing its asbestos liabilities, the courts were determined to prevent 'another James Hardie'.

The parallel corporate history of asbestos is also evident in the human stories that emerge in the shadow reports, especially regarding apportionment of liability from former manufacturing partnerships, product liability claims and attempts to 'hide' the dangers of asbestos from the public. The dominance of James Hardie products and the subsequent environmental contamination provides a constant narrative from workers, those diseased from trivial exposure and 'third wave' stories. The shadow report makes visible the relationship between James Hardie's past, current and future asbestos 'victims' and supports the notion of a 'shadow accountability'.

The economic downturn features prominently in both shadow reports as both companies are sensitive to changes in the demand for building products and currency fluctuations in the US market. For James Hardie, the US housing crisis was central to its inability to generate sufficient cash flows to contribute to an already financially distressed AICF. While the AICF had the scope to discharge its financial obligations through instalments, the moral accountability expected was evoked by the poignant stories from asbestos victims and their families.

5.4 SUMMARY

This chapter has presented the analysis of the silent and shadow reports of James Hardie and CSR from two perspectives. The intra-company analysis identified and categorised gaps in disclosures in relation to asbestos. The silent report, as the collation of company-generated data, presented a more cohesive and informative narrative on corporate disclosures. The shadow report, on the other hand, highlighted the absence of corporate disclosures on certain asbestos-related issues important to a wide range of constituents. As a counter or alternative narrative, the shadow reports re-narrate the corporate story and allow space for other voices.

6. Summary, conclusions and recommendations

Corporations, in many cases struggling to survive during periods of economic downturn, are less likely to prioritise social and environmental responsibilities and issues or disclose information relating to their interactions with society more generally.

The aim of this research was to conduct a case study of corporate disclosures in cases of uncertainty arising from long-tail liabilities. Uncertainties surrounding asbestos liabilities cut across disciplinary boundaries because they raise legal, health, insurance, environmental and accounting issues, so asbestos companies were examined in terms of their social accounting and accountability. The interaction of the financial uncertainty arising from asbestos liabilities with the uncertainties produced by a period of economic downturn provides a window through which to explore corporate disclosures, both financial and narrative.

To fulfil its aims, the research project addressed the following specific research objectives:

- to provide an overview of the global corporate and regulatory context surrounding asbestos in three specific jurisdictions, the US, the UK and Australia
- to provide an overview of the way in which asbestos liabilities are accounted for, in both financial and non-financial terms
- to provide an overview of the academic and professional literature on social accounting
- to conduct an empirical exercise in social accounting (silent and shadow reporting) for the two corporate entities with the largest asbestos liability 'burden' in Australia
- to identify and analyse the 'gaps' revealed by the silent and shadow reports
- to assess the extent of corporate asbestos disclosures activities provided through corporate public information and mandatory financial reporting and explore accountability from an alternative narrative provided by 'other' voices, external to the reporting entity, and
- to suggest alternative frameworks for reporting asbestos-related disclosures that capture the extent and nature of the asbestos problem to improve disclosure and subsequently improve accountability to all stakeholders, particularly in times of economic downturn.

6.1 SUMMARY

In addressing the study's aims and objectives, the researchers have made the following observations and recommendations.

Chapter 2 identified the many and varied regulatory regimes surrounding corporate responsibility and accountability for toxic products, including asbestos: in particular, the corporate and regulatory contexts. It was noted that with the continued extraction of asbestos and the subsequent fabrication of products containing asbestos, the asbestos problem is likely to remain on the agenda of legislators and regulators for many decades to come. The nuances in accounting for asbestos liabilities were highlighted. The availability of insolvency under the US

Bankruptcy Code Chapter XI provisions and other legal mechanisms to isolate asbestos liabilities as a corporate strategy were reviewed. In Australia, the two dominant players in the asbestos industry are still viable entities and a brief overview of their respective corporate histories was presented.

Chapter 3 focused attention on accounting for asbestos. Both traditional mandatory accounting disclosures and voluntary regimes were reviewed. Voluntary reporting regimes have the potential to provide exposure to information not captured through mandatory accounting regimes where economic information dominates. The current mandated disclosures of the case study companies, CSR and James Hardie, were also reviewed. It was observed that despite extensive disclosure, by both companies, of their asbestos liabilities, that disclosure was limited to a justification of the liability 'figure', thus isolating the issue from its social context.

Chapter 4 provided the basis for the empirical 'social accounting' exercise. In this chapter, earlier attempts at social accounting were reviewed and the research method outlined. The method adopted, the CSEAR approach, relies on the identification of gaps between the information reported by the company and that reported from external sources on the same issue. While this project isolated disclosures relating to asbestos, for these two companies, and any company involved with toxic products, a single product such as asbestos can be pervasive. The reporting categories developed under the CSEAR approach underline the pervasiveness of a single issue when it involves a toxic product.

From a review of the professional and academic literature on counter-narratives, the researchers categorised four types of gap in disclosure. A *praxis gap* identifies where a corporate policy or objectives are inconsistent with the actual conduct of the corporation. A *reporting gap* is where the corporate disclosures are inconsistent with the information derived from external sources and brings into question the perceived 'usefulness' of information for stakeholders. A *truth gap* is revealed where companies are deceitful in their claims or withhold knowledge. A *potential gap* occurs where companies avoid disclosing future or potential outcomes from current decisions. These gaps form the basis of the intra-company analysis presented in Chapter 5.

Chapter 5 presented an analysis and discussion from the social accounting exercise conducted. Silent and shadow reports were compiled for both James Hardie and CSR (available in Appendices 2 to 5). Examples of gaps in disclosure matching each of the four categories of gap were identified. This analysis highlighted the inability of extant mandatory reporting regimes to achieve accountability to a range of stakeholders. Additionally, the comparison between James Hardie and CSR revealed both similar and diverse practices.

6.2 CONCLUSIONS

The history of examining corporate behaviour through the use of alternative accounts provides a foundation for the academically researched shadow account. In this case, it has proved instructive to allow an opportunity to present alternative voices and problematise corporate disclosures and, in doing so, to present an opportunity for debate.

Both the silent and shadow reports demonstrate the importance and usefulness of disclosing asbestos issues financially and non-financially. The style and rhetoric of financial and narrative disclosures differs according to the specific genre of public discourse. Corporate 'official' discourse is formulaic, providing detailed actuarial and accounting rationales that tend to confine the information to the reporting of long-tail liabilities. Thus, this accountability discourse focuses on financial stewardship and prioritises the agency relationship. Shadow reporting has made visible the interconnectedness of constituents and provided shadow accountability through the articulation of the interests of a variety of stakeholders on the activities, threats and responses of James Hardie and CSR to asbestos-related issues: voices absent from the official accounts.

The silent and shadow reports highlight the multifaceted nature of asbestos narratives and while company-generated disclosures provide salient information on the financial position, performance and cash flows, particularly in times of economic downturn, voluntary disclosures provide a moral dimension to disclosure. The recommendations and policy considerations that follow have the potential to minimise the gaps identified in this project and enhance accountability.

6.3 RECOMMENDATIONS AND POLICY CONSIDERATIONS

The silent and shadow reports indicate the need for a multi-dimensional approach to both financial and non-financial disclosures from a range of accountability perspectives.

6.3.1 Accounting standard setters to consider disclosure of the impacts of asbestos on reporting entities

To address the economic viability and performance criteria, the IASB and FASB prescribe the accounting treatment of economic phenomena. Both the IASB and FASB are in the process of improving the disclosure regimes for provisions and contingent liabilities and this may provide an opportunity for enhanced disclosure of long-tail liabilities arising from the extraction, manufacture and use of toxic products, including but not limited to tobacco and uranium as well as asbestos. Although recognised in legal frameworks and institutions, the long-tail liability presents unique characteristics that are problematic for standard setters. The uncertainty in quantum and timing of future claims is a recognition and measurement issue in the context of foundational claims of representational faithfulness in financial reporting. As corporate governance regimes move toward a greater reliance on aspects of social responsibility, a financial accounting standard that deals explicitly with the disclosure of long-tail liabilities is recommended to assist users of financial statements make informed decisions.

Additionally, there are efforts in national and international jurisdictions to account for environmental-asbestos-containing materials (ACM) (see, for example, *Asbestos Management Review* 2012). Prescribing the introduction of a register of assets controlled by both private and public sector entities will have significant implications for the valuation of assets. In particular, reporting entities will need to consider the future costs of removing asbestos from the environment as well as the potential economic effects on fair value and value in use under IAS 36 *Impairment of Assets* and IFRS 13 *Fair Value Measurement* or the applicable FASB standards. Specific guidance to assist preparers holding ACM assets is required.

6.3.2 In the absence of the availability of a complete narrative, voluntary reporting guidelines can address this lacuna to some extent

Financial reports discharge a narrowly focused accountability and it has long been held that social and environmental reporting can address this lacuna to some extent. From the detailed review of the current voluntary regimes in Chapter 3, it is apparent that a number of aspects or components of these frameworks could enhance disclosure of asbestos-related issues by corporations. In practice, the GRI framework has the most potential to support increased disclosure and accountability when employed with one of the currently available supplements. The following examples combine the suite of performance indicators with the mining and metals sector supplement indicators to demonstrate the potentiality of a more holistic reporting framework.

Economic performance indicators focus on an organisation's impact on the sustainability of a larger economic system, as demonstrated by the flow of capital among stakeholders (GRI 2006). In relation to asbestos, the standards include:

- Aspect: Economic performance
 - EC4 *Significant financial assistance received from government.*

For example, in 2009 the James Hardie group was unable to contribute to the special purpose entity (AICF) established as the vehicle for asbestos compensation payments, owing to a fall in the US housing market. The standby facility of AU\$320m was established by the Australian and NSW governments to cover any shortfall in funding for 2009 and subsequent years (JHISE 2010a).

- Aspect: Indirect economic impact
 - EC9 *Understanding and describing significant indirect economic impacts, including the extent of impacts.*

For example, the economic viability of the James Hardie group has a direct impact on the funding of the AICF and an indirect economic impact on the ability of the AICF to fund litigation payments. The burden of payment, which is estimated to be AU\$1.54bn (discounted and inflated actuarial central estimate) or AU\$2.9bn (undiscounted central estimate) (KPMG 2010b) will fall on others, including the asbestos claimants and the state.

For both James Hardie and CSR, threats to the economic viability of either company have the potential to shift the full burden of responsibility to fund litigation payments to the AICF or CSR.

Environmental performance indicators focus on an organisation's impact on both living and non-living natural systems (GRI 2006). These impacts range from inputs (eg energy) and outputs (eg waste) to effects on biodiversity, compliance with environmental regulation and expenditure on the environment. In relation to asbestos, the standards include:

- Aspect: Biodiversity
 - EN13 *Habitats protected or restored.*
 - EN14 *Strategies, current actions, and future plans for managing impacts on biodiversity.*

An example is the efforts at remediation of the area and communities affected by mining operations at Wittenoom and Baryulgil.

- Aspect: Emissions, effluents, and waste
 - EN22 *Total weight of waste by type and disposal method.*
 - MM3 *Total amounts of overburden, rock, tailings, and sludges and their associated risks*
 - EN24 *Weight of transported, imported, exported or treated waste deemed hazardous under the terms of the Basel Convention Annex I, II, III, and VIII, and percentage of transported waste shipped internationally.*

For example, asbestos is identified as a key hazardous waste in the Basel Convention: '[o]nce widely employed in construction primarily for insulation. Still used in gaskets, brakes, roofing and other materials. When inhaled can cause lung cancer and mesothelioma' (UNEP 2005: 2). Both CSR and James Hardie have legacy issues arising from the disposal of products.

- Aspect: Products and services
 - EN26 *Initiatives to mitigate environmental impacts of products and services, and extent of impact mitigation.*
- Aspect: Overall
 - EN30 *Total environmental protection expenditures and investments by type.*

For example, this impact includes non-reclaimable, toxic materials/compounds. In Australia, in particular, asbestos is still present in the environment and contributes to the 'third wave' of predicted environmental exposure to asbestos in the community. Again, CSR and James Hardie could report on their legacy issues in relation to products and the disposal of products containing raw materials provided.

Social performance indicators focus on the impact of organisations on social systems under three broad sub-performance indicators: Labour practices and decent work; Human rights; and Product responsibility (GRI 2006).

1. *Labour practices and decent work*
 - Aspect: Occupational health and safety
 - LA7 *Rates of injury, occupational diseases, lost days, and absenteeism, and total number of work-related fatalities by region.*
 - LA8 *Education, training, counselling, prevention, and risk-control programmes in place to assist workforce members, their families, or community members regarding serious diseases.*

For example, both CSR and James Hardie have a duty to employees and their families for disease arising in future from occupational exposure and a similar duty to the community for the consequences of non-occupational exposure to asbestos.

2. *Human rights*
 - Aspect: Indigenous rights
 - HR9 *Total number of incidents of violations involving rights of indigenous people and actions taken.*
 - MM5 *Total number of operations taking place in or adjacent to indigenous peoples' territories, and number and percentage of operations or sites there are formal agreements with indigenous peoples' communities.*

An example is the Baryulgil miners and community from the former James Hardie operations.

3. *Product responsibility*
 - Aspect: Customer health and safety.
 - PR1 *Life cycle stages in which health and safety impacts of products and services are assessed for improvement, and percentage of significant products and services categories subject to such procedures.*
 - PR9 *Monetary value of significant fines for non-compliance with laws and regulations concerning the provision and use of products and services.*

For example, although asbestos is banned in Australia, both companies face future litigation claims from environmental exposure and sanctions for avoiding their legal responsibility to both current and future claimants.

The examples above demonstrate the applicability of the GRI guidelines for enhancing disclosure in the narrow scope of the issues that arise relating to the corporate exploitation of asbestos in Australia. The exercise is instructive and demonstrates the potential for broadening the scope to the global asbestos context. This could include indicators and aspects that encompass issues relating to current asbestos operations in both developed and developing countries.

Integrated reporting attempts to provide a holistic framework by combining both financial accounting and social and environmental impacts. The designers of this framework propose to address the inadequacies of financial reporting in terms of the medium-term to long-term impacts on business value and, when complete, this framework may provide another avenue by which to explore the disclosure of long-tail liabilities.

6.4 FURTHER RESEARCH

Asbestos is only one of a range of toxic substances mined and manufactured that potentially results in long-tail liabilities for companies. Further research could examine the potential for a GRI sector-specific supplement to enhance disclosure and corporate accountability in this area. As regulation surrounding ACM in the environment and the acknowledgement of the presence of ACM in less-developed economies increases, the impact on both preparers and users of financial reports will be need to be considered. Just as the impact of carbon-related legislation on the balance sheets of public and private entities is receiving prominence, the effects of long-tail liabilities arising from a range of known (eg tobacco, uranium, beryllium and asbestos) and unknown factors (eg mobile phone use) warrants further exploration.

A related, highly emotive topic in the context of corporate social responsibilities and disclosure is corporate governance. In the wake of adverse judgments against those charged with governance in the James Hardie case,³⁵ consideration must be given to governance and liability issues in corporate 'group' environments where toxic, or potentially toxic, products are involved.

35. At the conclusion of a protracted legal battle in May 2012, it was confirmed 10 directors and officers of James Hardie, and the parent company itself, were guilty of breaches of the Corporations Act 2001 in relation to disclosures to the media and the market about the adequacy of funding as a result of the 2001 reorganisation.

Appendix 1

Review of counter accounts

Report	Authors	Information sources	Objective	Gap
Consolidated Gold Fields Ltd 1972	CIS	Company financial records Wages and salary	To inform public of the exploitation of black workers in South African gold mines and direct attention to the benefits afforded shareholders and the morality of the economic system.	Reporting gap
Ford Motor Company 1973	CIS	Not covered or collated by established media Company financial records	Investigate and distribute information widely about the effect of Ford's practice on workers.	Reporting gap
The Rio Tinto Zinc Corporation 1973	CIS	Media reports Company financial records Company statements	To inform public of the exploitative activities that give rise to RTZ's profitability.	Reporting gap
The General Electric Company Ltd 1973	CIS	Company financial records Company statements	To investigate the redundancies at GEC and management rhetoric of profitability = efficiency = national interest.	Truth gap
The Oil Fix 1974	CIS	Historical narrative on oil companies Company information (public) Government information	To investigate origins and implications of the energy crisis and the creation of the dependency on oil by oil-producing companies.	Reporting gap
Where is Lucas Going? 1975	CIS	Interviews Company financial records	To investigate rationalisation of staff and working conditions at Lucas Industries UK.	Reporting gap
Unilever's World 1975	CIS	Historical records	To uncover the corporate rhetoric of benevolence towards workforce.	Praxis gap
Avon Rubber Co. Ltd. 1976	Social Audit Limited	Interviews of company management and Trade Unions representatives Government records	To describe the social costs and benefits and environmental impact of the company's operations. To offer alternative reporting mechanism for companies.	Praxis gap
Barclay's Shadow Report 1982	Dummet	Annual Report AGM	To disclose information about Barclay's economic and political impact on racial discrimination in apartheid South Africa	Reporting gap
Failing the Challenge: The Other Shell Report 2002	Friends of the Earth	Individual stories Activists Advocacy groups	To inform Shell plc on behalf of communities living with Shell's operation, their 'fenceline' neighbours, about substandard living conditions.	Praxis gap
Behind the Mask 2004	Christian Aid	Advocacy groups	To propose international legal and social framework for MNCs to protect human rights and environment in developing countries.	Praxis gap
British American Tobacco – The Other Report to Society 2002	Action on Smoking and Health	BAT Social Report 2001 Internet sources Activists Health agencies	To pressure BAT into adopting the WHO Framework Convention on Tobacco Control and its standards.	Truth gap
AMEC Counter Report 2002	Friends of the Earth	AMEC Sustainability Report Turkish & UK activists & advocacy groups.	To propose national and international legal regimes to enable communities to hold corporations to account for social and environmental impacts.	Potential gap
Climate Crime File – Esso 2005	Greenpeace	Activists Internet sources Company information	To strengthen and support legislation to combat climate change and pressure Esso to support energy initiatives in renewable sources.	Truth gap
Climate Crime File – Ford 2005	Greenpeace	Activists Internet sources Company information	To propose stronger government sponsorship of public transport and fuel efficiency. To pressure Ford to adopt fuel-saving technology for car manufacturing industry.	Truth gap
A Case Study of Unilever in Indonesia 2005	Oxfam	Unilever management Public and internal documents Data from other sources	To assess and question assumptions about the effect of foreign direct investment on poverty alleviation.	Praxis gap
Death and Taxes 2008	Christian Aid	Poverty and health statistics Company accounts Millennium development Goals	To investigate the negative impact of tax evasion, primarily by the extractive industry, on the attainment of the Millennium development goals.	Praxis gap

Appendix 2

James Hardie Industries SE³⁶ Silent Report 1 April 2009 – 31 March 2010

Report collated from publicly available information in the corporate accounts and official website relating to the issue of asbestos.

MISSION AND POLICY

Asbestos liabilities

In Australia, up to 1987, two former subsidiaries of the James Hardie group, Amaca and Amaba, now owned and controlled by the Asbestos Industries Compensation Fund (AICF), manufactured products containing asbestos and exported these products to various countries. Before 1937, the former parent company, now ABN 60, had also manufactured products, in Australia, that contained asbestos. Additionally, ABN 60 was a shareholder in companies that produced asbestos products in Malaysia and Indonesia and mined asbestos in Canada and South Africa (JHISE 2010c). Before 1988, a New Zealand subsidiary in the James Hardie group manufactured asbestos products in New Zealand. These claims are covered by a state-run compensation entity funded through an annual levy from the subsidiary. Despite having operations in several jurisdictions, the Amended Final Funding Agreement (AFFA) that established the AICF, provides compensation for certain claims, expenses and liabilities arising only in Australia (JHISE 2010a). Therefore, it is possible that claimants outside Australia or whose claims arise from exposure to asbestos outside Australia could pursue compensation directly against James Hardie Industries SE. In addition, changes to current legislation and laws of various jurisdictions may find JHISE liable for the claims of existing or former subsidiaries. Claims of this nature could be costly and time consuming, and could materially adversely affect the financial position, liquidity, cash flows and results of operations (JHISE 2010c).

During this reporting period, the company continued to make major progress on the legacy issues related to asbestos and its operational results, despite the economic difficulties (JHISE 2010a). The AFFA has proven to be a 'robust and flexible' agreement that allows 'James Hardie to grow and be profitable' while meeting its commitment to the 'asbestos liabilities' of former subsidiaries (JHISE 2010a: 2).

According to the AFFA, the company is required to make annual funding payments to the AICF. These payments are based, in part, on updated actuarial estimates of expected asbestos-related personal injury and death claims for the current financial year and the next two years (JHISE 2010a). The discounted central estimate of the asbestos liability has decreased from AU\$1.782bn on 31 March 2009 to AU\$1.537bn at 31 March 2010 primarily because of changes in the government bond yields that are used to discount future cash flows and a reduction in the projected number of future claims for a number of disease types (JHISE 2010a: 25). Nonetheless, the estimate of actuarial liabilities is subject to considerable uncertainty due to the outcome of future events, including legal, medical and social developments. Increases in the company's asbestos liability will be reflected as charge to consolidated statements of operations and could have a material adverse effect on financial position, liquidity, cash flows and results of operations (JHISE 2010c).

The company is subject to non-monetary restrictions that prohibit transactions that would affect the relative priority of the AICF as a creditor and these include the payment of dividends and other dealings with share capital (JHISE 2010c). The long-term nature and complexity of the AFFA presents the possibility of adverse risk if the parties seek further interpretation of the terms or legislation or wish to renegotiate the terms, or the Australian Tax Office enacts new or adverse tax legislation (JHISE 2010c).

Loan facility

'Under the terms of the AFFA, the company was not required to make a contribution to the AICF during fiscal year 2010' (JHISE 2010a; 29). On 7 November 2009, the Australian and NSW government advised that they would provide a loan facility of AU\$320m to the AICF so that the AICF could continue to make payments to claimants in full without rationing. A funding shortfall could 'subject us to negative publicity. Such negative publicity could materially adversely affect our financial position, liquidity, results of operations and cash flows, employee morale and the market prices of our publicly traded securities' (JHISE 2010c: 9)

Dividends

In 2009, the company decided not to pay a year-end dividend or commit to future dividends until there was a significant improvement in market and global conditions that could reduce the level of uncertainty surrounding industry trends, and until the 'company-specific contingencies dissipated' (JHISE 2010a: 2).

Strategy

Non-GAAP financial measures are used for internal strategic decision making, evaluating performance and forecasting results. These measures include:

1. operating income excluding asbestos, ASIC expenses and asset impairments
2. effective tax rate excluding asbestos, asset impairments and tax adjustments
3. net income excluding asbestos, ASIC expenses, asset impairments and tax adjustments (JHISE 2010c: 53).

Funds available for capital expenditures, debt repayments, payments of dividends and other distributions have been reduced by the amounts paid to the AICF. The financial positions, liquidity, results of operations and cash flows have, and will be, reduced or materially adversely affected. The obligation to make payments to the AICF could affect or restrict the ability to access equity or debt capital markets (JHISE 2010c).

CSR Demerger

No reporting under this category.

CORPORATE GOVERNANCE STATEMENT

Asbestos Industries Compensation Foundation

James Hardie and the NSW government were advised on 23 April 2009 that, within two years, the available assets of the AICF were likely to be 'insufficient to fund the payment of all reasonably foreseeable liabilities' (JHINV 2009a:1). The capacity of the AICF to satisfy claims is linked to the 'long term financial success of James Hardie, especially the company's ability to

36. The parent company for James Hardie Industries changed its registration details during the reporting period from being a Dutch company (NV) to a Societas Europaeas (SE).

generate net operating cash flow' (JHINV 2009b:1). The decline in company's cash flow from, among other things, the unprecedented downturn in the US housing market has 'regrettably' affected the contributions to the AICF (JHINV 2009b:1).

Redomicile to Ireland

The proposal (to change domicile) will not alter the overall commitment of James Hardie to make contributions to the AICF, but the costs associated with the Proposal will most likely reduce the amount of contribution due in the 2011 financial year (JHINV 2009b). The Irish domicile is anticipated to result in reduced tax payments relative to taxes and provide medium-term and long-term benefits for the AICF (JHINV 2009b).

ASIC proceeding and appeal

In February 2007, the Australian Securities and Investment Commission (ASIC) commenced civil proceedings in the NSW Supreme Court against James Hardie, ABN 60 and 10 former officers and directors of the company. The allegations against the company included: contraventions of Corporations Act/Law relating to continuous disclosure, and engaging in misleading or deceptive conduct in relation to a security (JHISE 2010a: 25). On 23 April 2009, the court issued judgment against the company and 10 officers and directors. Eight lodged appeals and ASIC lodged cross-appeals against the appellants. The appeals were heard in May 2009. The company has agreed to pay a proportion of the cost of the proceedings and defending appeals, with the remainder met by third parties.

Owing to its geographical spread and number of employees, and because its securities are traded on the ASX and NYSE, the James Hardie group is subject to regulatory oversight in various tax jurisdictions. Regulatory action by ASIC and tax revenue authorities has already resulted in significant increases to operating costs. In relation to the ASIC proceedings and appeals, the company may be liable for defence costs and liabilities of current and former directors, officers or employees indemnified by James Hardie. In 2010, 2009 and 2008 costs incurred for ASIC proceeding and appeals were AU\$3.4m, AU\$14.0m and AU\$5.5m respectively (JHISE 2010c).

Australian Tax Office and Project Chelsea

No reporting under this category.

ECONOMIC REPORT

The company's net operating profit decreased from US\$136.3m in the previous period to a net operating loss of US\$84.9m in the period covered by this report. This result included:

- unfavourable asbestos adjustments of US\$224.2m
- AICF SG&A expenses of US\$2.1m
- AICF interest income of US\$3.3m
- a realised gain on the sale of AICF investments of US\$6.7m
- tax expenses related to asbestos adjustments of US\$1.1m.

To allow readers to assess 'the underlying performance of the fiber cement business' the results from continuous operations *exclude* the above asbestos-liability-related items. Additionally, balance sheet references exclude the net AFFA liability of US\$966.2m (JHISE 2010a).

Restrictive covenant requirements, such as debt to equity ratio, for James Hardie's credit facility are calculated excluding assets, liabilities and other balance sheet items/income, expenses and other profit and loss income statement impacts of the AICF, Amaba, Amaca, ABN 60 and Marlew Mining Pty Ltd.³⁷ Additionally, the company 'must ensure that no more than 35% of free cash flow (as defined in the AFFA) in any given financial year is contributed to the AICF' (JHISE 2010a: 29).

Included in the general and administrative expenses are ASIC expenses of US\$3.4m for the fiscal year. Since the beginning of the ASIC proceedings in 2007, and the appeals the company's net costs total US\$23.1m.

US housing market

James Hardie derives approximately 75% of its net sales from the US housing market (JHINV 2009a). In March 2009, new housing construction in the US had decreased by 75% from a peak, in the period from 2005 to early 2006, of more than two million houses, to 500 000.

Disclosure of asbestos liability

Since March 2007, previously deconsolidated entities have been consolidated to account for certain asbestos liabilities. Under the terms of the AFFA, the AICF is deemed a special purpose entity and, therefore, the company's consolidated statements include the asbestos provision of the AICF (JHISE 2010a: 88). This provision is based on the central estimate, as the best estimate, of the most recent actuarial estimates of projected future cash flows. The assumptions include an estimate of the total number of claims by disease type through to 2071; average cost of claim settlements; legal costs of litigation; proportion of claims repudiated; the rate of receipt of claims; settlement strategy; timing of settlements; and the long-term rate of inflation, legal costs and claim awards. The actuarial assessment is performed annually and changes in the estimate are reflected as a charge to the consolidated statement of operations (JHISE 2010a).

Exchange rate

Payments to the AICF are calculated and denominated in Australian dollars although only 19% of net sales were derived in Australia for the financial year. Therefore, fluctuations in the US dollar or other foreign currency affect the amount of annual payments to the AICF and the size of the liability reported on the balance sheet. Adverse fluctuations this year had a negative impact of US\$220.9m. Owing to the size of the asbestos liability, unpredictable volatility in reported results is expected into the future (JHISE 2010c).

Asbestos claims and settlements

The number of new claims filed for the year was 535, and 540 existing claims were settled, a figure slightly below actuarial estimates and below the 607 claims filed and 596 settlements for the previous year. The average claim was AU\$191,000, which is similar to the previous year but is slightly lower than the actuarial estimate. The actuarial estimate for asbestos claims paid for the year was AU\$114.2m, but only AU\$103.2m was actually paid. Legal costs of AU\$8.1m and insurance and cross-claims of AU\$16.9m led to a total net claims cost of AU\$86.3m, which was lower than the actuarial estimate and the previous year (JHISE 2010a).

37. Formerly Asbestos Mines Pty Ltd, a wholly owned subsidiary of the James Hardie group, operating an asbestos mine and milling operations at Baryulgil, NSW.

Payments to the AICF

'Future funding for the AICF continues to be linked under the terms of the AFFA to the company's long-term financial success, especially its ability to generate net operating cash flow' (JHISE 2010a: 30).

Payments to the AICF and ATO may result in cash flow shortfalls, which will be funded with future cash flow surpluses, cash on hand and credit facilities. The company funds the AICF on an annual basis, the amount depending on its 'net operating cash flow' and other factors, including free cash flow (as defined by the AFFA), actuarial estimations, actual claims paid, operating expenses of the AICF, and the annual cash flow cap. Payments to the AICF have been made on the following basis:

1. an initial funding payment of AU\$184.3m paid in February 2007
2. 'no contribution was required' in the fiscal year 2008
3. a contribution of AU\$118m in the fiscal year 2009
4. '[the] company was not required to make a contribution' in the fiscal year 2010
5. a payment of AU\$72.8m will be made in the fiscal year 2011 (JHISE 2010a: 29).

The total contribution to the AICF since the beginning of 2007 is AU\$375.1m (JHISE 2010a).

EMPLOYMENT REPORT

Workers' compensation claims by former employees are insured with various Australian state-based schemes and insurance companies (ie insurance policies). Two components of the actuarial assessment of the liability that are related to workers' compensation claims include an estimate of amounts met by a scheme or insurance policy and by former James Hardie companies. Adjustments are reflected in the consolidated statements of operations in the period in which they occur (JHISE 2010a)

Indigenous workforce

No reporting under this category.

CUSTOMERS AND PRODUCTS REPORT

James Hardie pioneered the development of asbestos-free fibre cement technology in the mid 1980s. The company made use of the benefits of durability, versatility and strength by designing and manufacturing a wide range of building products using fibre cement (JHISE 2010c).

The residential building industry represents the principal market for fibre cement products and, across a range of product applications, these products have gained broader acceptance in the Philippines, Asia and the Middle East over the last decade. Nonetheless, in some of the developing markets, gypsum use has increased and penetrated into fibre cement markets. Fibre cement and asbestos cement facilities are located throughout Asia and exporting between countries is common practice (JHISE 2010c: 34)

COMMUNITY REPORT

From the fiscal year beginning 2007, the company agreed to fund asbestos-related research and education for a ten-year period. The liability related to this agreement is represented in 'Other liabilities' on the consolidated balance sheets (JHISE 2010a).

The potential range of estimated costs is affected by a number of variables. One of the critical assumptions in the calculation of the discounted central estimate of asbestos liability is the estimated peak year of mesothelioma disease claims. Variations in these claims have a greater impact on the estimate than other sensitivities. The peak year was estimated as 2010/2011, but if the peak were to occur five years later (2015/2016) the discounted central estimate could increase by approximately 50% (JHISE 2010a).

ENVIRONMENTAL REPORT

The company has a programme, Zero to Landfill, which is a whole-of-business initiative for manufacturing, focusing on eliminating waste and improving material yield. Additionally, local government authorities regulate dust and odour emissions (JHISE 2010a).

Where expenditures on environmental remediation relate to an existing condition caused by past operations they are expensed. Liabilities for environmental remediation occur when the environmental assessment and/or remedial efforts (where an obligation exists) are probable and costs can be reasonably estimated (JHISE 2010a).

Appendix 3

James Hardie Industries SE³⁸ Shadow Report 1 April 2009 – 31 March 2010

Report collated from information in the public domain and provided externally to the corporate accounts and official website

MISSION AND POLICY

James Hardie [is] described as the 'pin-up poster company for ethical investment because its attempts to avoid its corporate responsibility have cost it money and reputation'. The company is 'bad at being bad' (Knight 2009a).

Asbestos liabilities

In 2001 Justice Santow approved a restructure for James Hardie to move its parent company to the Netherlands six months after it had 'ostensibly cut its ties with asbestos by setting up a compensation trust', but James Hardie did not disclose 'all it should have' (Sexton 2010e). The way the James Hardie group handles asbestos compensation is described as a 'disastrous hard-line approach' by 'hiving off former asbestos subsidiaries' and 'a shift overseas' (Sexton 2009a).

In September 2009, the Bernie Banton³⁹ Foundation was launched and widow, Karen Banton, warned of the need for legislative change to the corporate veil protection for companies without the 'moral fibre' to do the right thing [when] governments fail to protect society from rogue companies (Anon. 2009i). In relation to the Corporations Act, 'buried deep in the federal governments too hard basket is some unfinished business from the James Hardie asbestos furore in 2004'. Following the furore of the Jackson Inquiry in 2004, the government received two proposals to ensure the 'there would never be another James Hardie', including changes to protect the status of future creditors and the issue of the corporate veil (Sexton 2010a).

Loan facility

A loan facility of AU\$320m was negotiated to cover a shortfall which if unattended would leave thousands of dying people without assistance. 'The fund was draining swiftly because James Hardie...had not topped it up. It had been accused of using a legal loophole that says the company could make the needed contribution of 35 per cent of its "free cash flows"' (Farr 2009). When it was first announced, despite a AU\$160m stand-by loan each from the Federal government and NSW state government to make up any shortfall in James Hardie payments to the AICF and half-year loss of more than AU\$100m; James Hardie was considered unlikely to use loan facility (Hyam 2009).

On hearing of the AICF shortfall, Karen Banton commented that '[t]oday is another black mark in the history of this company' (Anon. 2009b) and that James Hardie had again failed its victims (Hawley 2009). In cases of funding shortfall the AICF can apply for a variation to the AFFA, allowing it to pay in instalments (Janda and Walsh 2009) instead of lump sums for compensation claims (Anon. 2009b). Given the nature of the disease, however, this means that by the time victims have gone through the process they are keen to see lump sum compensation in their bank accounts (Chris Bowen quoted in Hawley 2009). 'The

problem is if you're a mesothelioma victim your life span is very, very short and to be put on a financial drip feed-like AU\$100 one month, AU\$200 the next – that's not conducive for victims [sic]. They need to know their family, their loved ones are financially secure when they pass away. It just puts more pressure on and at this stage in their suffering, they don't need this extra worry and stress' (ADF President quoted in Rubinsztein-Dunlop 2009).

Gippsland Asbestos Related Diseases Support Group (GARDS) welcomed the AU\$320m loan to James Hardie as a number of asbestos sufferers in Gippsland were dying and in need of a lump sum payment for their families (Anon. 2009e). Queensland support group for people with asbestos-related illnesses was pleased with the bail out of James Hardie compensation fund as '[m]any sick Queenslanders would have suffered if the fund ran out of money' (Anon. 2009j)

The Prime Minister warned that the AU\$320m bailout did not excuse James Hardie from future payments (Anon. 2009b). There would be '[n]o excuses for James Hardie and nothing excuses their responsibility into the future [either]' (Draper 2009). There was an expectation that the money [loan] would be returned to taxpayers when James Hardie resumed full payment. Mr Robson (ADF president) said that there were some fears among some of the victims' groups but he was confident that the company would resume its contributions as the global economy improved (Farr 2009). Mr Robson met with the new James Hardie board and declared that '[t]here was a feeling in the room [that] things had changed from the old board' (Farr 2009).

Dividends

Owing to the US housing market crash, James Hardie announced that no dividend would be paid until economic conditions improved (Sexton 2009g). Nonetheless, with 'cash flows on the mend', James Hardie was expected to pay a dividend by the end of the year. 'James Hardie has taken pains to say that there is no strategic link between paying into the fund and paying dividends. Still, the contributions [to the AICF] make dividends more politically palatable' (Hutton 2009a).

Strategy

The perennial bad guy has been James Hardie, and this year saw further bad publicity for the former asbestos maker: many of its former directors were found guilty of making a misleading statement; the current company decided to move to Ireland for a tax break; the asbestos compensation fund is running short of money; and it was discovered there might be another deadly by-product from the company's asbestos (Janda 2009c).

The company reputation 'took a hammering unmatched by any other blue-chip in recent memory'. Ten directors and executives (nine appealing) were sued for breach of duties, and shareholders and the NSW government resumed responsibility for AU\$2bn expected asbestos compensation that the company had disavowed in 2004 (Sexton 2010a).

CSR demerger

After the enormous distress to sufferers of asbestos diseases, public outrage and cost to taxpayers of bringing Hardie to heel, there was no way any government, any regulator or any judge was going to accept, at face value, assurances about

38. The parent company for James Hardie Industries changed registration details during the reporting period from being a Dutch company (NV) to a Societas Europaeas (SE).

39. Bernie Banton was a former James Hardie employee and the representative for asbestos disease sufferers in the Final Funding Agreement (FFA) negotiations and subsequent establishment of the AICF.

the impact of another [CSR] restructure on asbestos compensation (Sexton 2009a).

'The AICF, which often shares liability for compensation with CSR and is concerned it might have to pick up any shortfall' wanted CSR's application for a demerger to be rejected (Sexton 2010d). Even so, the CSR accounts showed a provision for AU\$446.8m and 641 pending claims in Australia while expectations of James Hardie's contribution was AU\$1.78bn over the next 50 years (Grigg 2009a).

The Australian Securities and Investment Commission (ASIC), the NSW government, James Hardie Industries NV and the Asbestos Injuries Compensation Fund (AICF) had objected to CSR's application, raising concerns about CSR's ability to meet its asbestos liabilities after a demerger due to the new CSR's reduced capitalisation (Anon. 2010a).

CORPORATE GOVERNANCE STATEMENT

The current board has nothing to do with [the] 'ethically-challenged behaviour of its predecessors' but they are working 'with one hand tied behind their backs thanks to these legacy issues' (Knight 2009a).

Asbestos Industries Compensation Foundation

In 2009, there was renewed furore over the amount of funds in the asbestos compensation trust fund (Janda 2009a) and 'JHI slumped another 4.2 per cent' as controversies continued about funding for AICF (Janda 2009b). In April 2009, the AICF issued a formal warning to James Hardie and the NSW government that it would not be able to meet all its liabilities within the following two years. The NSW Asbestos Diseases Foundation (ADF) president believed that there was 'plenty of money in the fund for the next two years' and that the announcement was made to divert attention from the Supreme Court finding in ASIC case (Janda and Walsh 2009) and he believed that the fund was months away from declaring insolvency (Rubinsztein-Dunlop 2009).

James Hardie had paid AU\$302m into the AICF since its establishment in 2007. The average claim settlement was AU\$176,433 (Hopkins 2009). The NSW Attorney General stated that James Hardie had 'a legal and moral obligation' to compensate and the government was committed to ensuring that obligations were met and that the agreement (AFFA) was designed so that it did not threaten the solvency of the company. Many stakeholders recognised that insolvency was in no one's interest (Walsh and Long 2009).

James Hardie was to renew payments to the asbestos fund the following year when the operating profit was expected to be US\$115m. James Hardie reported a headline loss of US\$97.5m (including extraordinary items) for the six months to 30 September compared with US\$154.9m for the same period in the previous year (Hopkins 2009). James Hardie was a standout performer after reporting a first half loss but said it was on track to record growth in the latter half, which meant that it should have been able to contribute to the asbestos fund. This was 'really good news for the market because James Hardie had flagged in April that it wouldn't be able to contribute to the fund this financial year' (Anon. 2009k). According to James Hardie, the move to Ireland would reduce the ability to pay in the following financial year (Rubinsztein-Dunlop 2009).

The AICF faced the 'third wave' of asbestos claims as children and spouses showed the effects of asbestos exposure (Grigg and Murray 2010). Following the James Hardie announcement that AICF was funded for only a further two years, the story appeared about Anita Pohlner, 51 years old, who had contracted mesothelioma from washing her father's work clothes. The AICF was designed for the 'end-users' not employees, and it was that this would dominate future legal proceedings (Alexander 2009).

While the AICF funded the claims from James Hardie, a no-fault federal compensation scheme could be introduced to fund claims rather than subjecting the victims to protracted litigation. Fears were raised that Australia might follow the US and litigation may commence against 'peripheral defendants', ie parties with tangential involvement in the use or supply of asbestos products. While a scheme would reduce litigation costs there was a warning of 'entrenched interests' (Mills 2009).

Redomicile to Ireland

James Hardie announced plans to relocate to Ireland to reduce the US\$50m p.a. costs associated with having the US as its main market while the company was domiciled in the Netherlands (Lannin 2009b). The move was seen as 'another example of corporate greed as it seeks to dodge taxes, and worse, potentially threatening payments to asbestos victims, while refusing to freeze the salaries of its own executives in hard times' (Smith 2009a). '[A]nalysts argue that it is "not a natural place to be"' (Rochfort 2009b). The move to the Netherlands created a few headaches: the executives were required to be Dutch residents while the operational headquarters and bulk of assets were in the US and the bulk of the shareholders were in Australia. James Hardie was now paying a higher tax rate in the Netherlands than it expected when it moved there in 2001 because the relevant tax loophole was closed (Rochfort 2009b). The treaty giving favourable tax treatment to James Hardie had been revised in 2006 and since then the company had been arguing with the US IRS that it no longer qualified for taxation benefits (Janda 2009d). Ireland had a low corporate tax rate of 12.5% (Rochfort 2009b). The reason for the move to Netherlands was to take advantage of tax rates and not to 'sidestep its obligations to victims of its former asbestos products. [The company] has maintained [that] the move was tax related' (Rochfort 2009b). 'Not surprisingly the company wants out of the Netherlands. But Dutch law makes it impossible to relocate to the US or back to Australia' (White 2009).

The move to Ireland was a two-stage process: Stage one was a vote to become a Societas Europaeas in August (Janda 2009d). This move required only 75% shareholder approval (Rochfort 2009a). Apparently, James Hardie wanted to domicile in the US but Netherlands law required 95% shareholder approval for that but only 75% to transform into a European company (Rochfort 2010). Stage two was the move to become an Irish registered company in January 2010 (Janda 2009d). The Australian Shareholders Association (ASA) commented that a move to Ireland would be another costly and complex distraction for James Hardie. The Irish constitution allowed for the removal of directors with and without cause and without shareholder vote and this would ignore the wishes of Australian shareholders (Rochfort 2009b).

'There is something different about asbestos liabilities' and 'the law appears to allow companies to restructure without regard to the rights of people yet to fall ill to exposure to asbestos' (Sexton

2010e). The cost of the move to Ireland was estimated at AU\$64–\$89m with more than half due to the Netherlands for tax. The ADF was concerned that costs would eat into the profits needed to pay into the AICF since James Hardie had already indicated that there would be no payment for 2010, owing to the US housing collapse, and the 2011 payment was likely to be reduced by the of redomiciling to Ireland (Janda 2009d). The ADF and the employees' union met with James Hardie before the AGM at which shareholders would vote on the redomicile to Ireland. The ADF president questioned why the money (US\$71m) was being spent on the move when the AICF could potentially run out of money (Wilson 2009). The delegation also wanted a formal response and assurances on the security of compensation payments as they believed that James Hardie had a legal and moral responsibility to do so (Skully 2009).

The ATO was watching James Hardie and the move to Ireland would set off more alarm bells. James Hardie had recently had to pay AU\$153m to ATO to settle a dispute over the restructuring and the move to the Netherlands (Knight 2009a).

ASIC proceeding and appeal

The Australian Securities and Investment Commission (ASIC) hearing sparked reflections on the James Hardie corporate scandal. James Hardie had known for decades that there was no safe level of asbestos exposure and the success of James Hardie's asbestos products had resulted in the highest rates of mesothelioma in the world, with the peak expected in 2020 (Walsh 2009).

In April 2009, the NSW Supreme Court found that 10 former James Hardie directors and managers had breached corporations law over the restructuring and establishment of the Medical Research and Compensation Fund (MRCF) in 2001 by providing false statements to the stock exchange that the scheme was 'fully funded' and 'provided certainty to victims' (Walsh and Long 2009). James Hardie had used a 'labyrinth of legal and actuarial advice' to justify decisions about separation and the MRCF (Walsh 2009).

Following the court decision, former board members, including Meredith Hellicar⁴⁰, resigned as directors of AMP and Amalgamated Holdings. Hellicar was found to be an 'unreliable witness' and despite denying knowledge, evidence in court showed that she was part of a phone hook up to assess the reaction to Hardie's plan to jettison its asbestos liabilities (Walsh and Long 2009). There was speculation as to whether Peter Willcox would step down from Telstra⁴¹ board. Telstra needed someone who was 'not tainted' (Lannin 2009a).

It was a successful civil case but Karen Banton said that her husband would have preferred criminal charges (Walsh and Long 2009). Following the finding of the civil case against the directors, an asbestos widow claimed that the decision did 'not go far enough to make up for the pain her husband and other victims endured'. 'When I watched my husband fight for breath in agony;

40. Meredith Hellicar had been a member of the board of James Hardie during the 2001 restructure and became chair of the board after the Jackson Inquiry. A position which she held through to the laying of charges by ASIC in 2007.

41. Telstra is the former government-owned telecommunications company. It is one of the top few companies by market capitalisation in Australia.

I wanted to see those people in striped pyjamas behind bars. Not wandering around Sydney in corporate suits'. 'These people don't care; they haven't admitted what they've done. They haven't stepped up to the mark and said sorry' (Peacock 2009b).

James Hardie planned an appeal but was waiting until the penalties had been handed down (Lannin 2009a). Between the breach in corporations law in April and the handing down of fines, ASIC urges the court to 'hit James Hardie hard' as 'it was far from "an isolated and uncharacteristic failure" relating to a single media release' but related to a 'culmination of planning over a long period'. The MRCF was 'one the most significant decisions in the corporate history' and was unachievable without a communication strategy regarding the sufficiency of funds available to the MRCF (Sexton 2009f)

In August 2009, the NSW Supreme Court handed down fines and bans on 10 former directors and officers over misleading statements about the adequacy of funds. Fines ranged from AU\$30,000 to AU\$350,000 (the total amounting to AU\$730,000) and bans from directorship ranged from 5 to 15 years. James Hardie was fined AU\$80,000 for breaches of continuous disclosure in 2003. A 'properly informed market depends on accurate and timely information' (Logue 2009). James Hardie spent AU\$25.5m on the case and shares slumped 15 cents lower at AU\$6.69 after the Supreme Court fines and bans were announced (Logue 2009). The decision to fine and ban 10 executives, including non-executive directors (NEDs), caused some concerns about NED duties and reputational loss as a consequence of a 'one-off lapse about PR'. The problem was, however, more than a 'misleading press release' and required a 'clearer and wider framework of accountability' to guide directors' actions if 'total disasters' were to be avoided in the future (Clarke 2009). It was argued that the directors knew from board papers that James Hardie had to convince the public that there were sufficient funds (Knight 2009b). NEDs have long been considered independents that bring unbiased and diverse opinions to decision making of the sort that 'go with a non-liability' status (Kitney and Durkin 2010). 'The findings put directors' duties in "sharper context" and [show] the need for NEDs to look at strategic issues for a company with due diligence' (Jury 2009). In addition, the judge was 'making the point that these people were running a public company and must look at these sort of things [press releases] carefully' and not rely on other people (Jacobs 2009a).

While the fines and legal fees were covered by directors' insurance, the only penalty for officers would be the 'shame of being barred from working in corporate world'. The saga has always been about 'moral obligations, but in the business world it is called corporate social responsibility' (Walsh 2009).

Karen Banton was quoted as saying that the bans were welcomed but the fines were a 'joke' and said: 'I think Bernie would have been very, very angry with the fines' (quoted in Peacock 2009a). It was argued that '[i]ronically, the defendants haven't been punished for asbestos legacy' and that the AICF is already being tested by the effects of GFC. The 'fear among asbestos campaigners is that the company might eventually end up in US, where it makes most of its profits, and where it might seek Chapter 11 bankruptcy protection'. However, it would face the combined fury of government, ACTU and asbestos support groups (Peacock 2009a).

Seven of the 10 defendants found to have breached their duty of care and diligence over the 2001 media release and the terms 'fully-funded' and 'certainty' lodged an appeal over their fines of AU\$700,000 and the claim that the media release had the potential to mislead investors and others (Sexton 2009b)

Australian Tax Office and Project Chelsea

A new phase in James Hardie's attempt to put 'legacy issues' behind it began with a dispute with the ATO over a case from 1998, as part of Project Chelsea. Three wholly owned subsidiaries were sold and the ATO alleged that the capital gain was reduced from AU\$524m to AU\$46m by a large intra-group dividend paid seven months before the sale. The ATO sought AU\$368m in tax, interest and penalties (Sexton 2009d). James Hardie was accused of using 'cavalier' conduct to forestall the case, by claiming legal professional privilege over documents sent to solicitors about the sale of subsidiaries in Project Chelsea (Sexton 2009c). The ATO challenge to the professional privilege argument was found in favour of James Hardie (Jacobs 2009b).

US tax dispute

There was a dispute related to dividends from James Hardie's US subsidiary to the parent in Netherlands. The tax treaty rules changed in 2006 and the US IRS argued that James Hardie did not qualify for benefits in 2006 and 2007. The dropping of the AU\$67m claim against James Hardie provided 'more comfort for shareholders' (Anon. 2009o).

ECONOMIC REPORT

There are two James Hardies. There is the media villain excoriated for selling asbestos-related products that are now claiming more lives than many had feared...And then there is the investors' darling (Hutton 2009b).

The first half of the year for James Hardie saw US housing starts down 75% since January 2006; negative cash flow, despite a full year profit of AU\$176m so no payments were made to the AICF; and the spending of AU\$14m to defend the case bought by ASIC (Sexton 2009g). The biggest worry was that the combination of an inadequately funded compensation fund, a dropping US dollar and a dramatic drop-off, following the global financial crisis, in the US homebuilding industry would mean the company would almost certainly need government help for the short and medium term to compensate its growing army of Australian asbestosis and mesothelioma victims (Main 2009).

US housing market

The suspension of payments to the AICF was a move the company made after the global financial crisis, largely due to its interests in US (Hawley 2009). No contribution was made to the AICF at the end of the 2009 fiscal year because James Hardie suffered a negative cash flow owing to the housing slump in US and it was then not likely to make a payment until July 2010. The AICF had AU\$140m at 31 March 2009 and only AU\$112.7m in October 2009 and was expected to run out of money by mid-2010 (Anon. 2009i).

There was a surprise turnaround for James Hardie in the face of the US housing slump with its first-quarter results (Rochfort 2009b). For the first few months of 2009, 'the world was still plummeting after falling off a financial precipice' (Janda 2009c). In the three months to the end of June 2009, James Hardie

recorded a AU\$95m loss. This loss was mostly caused by the continuing weakness in the US housing market (Hyam 2009). Even so, James Hardie beat market expectations with its first-quarter results of a AU\$94.7m, including unfavourable asbestos adjustments relating to currency movements. Without the liability, legal and tax adjustments, the first-quarter result was a profit of AU\$41.6m, and the company's shares surged 21 cents to AU\$7 (Wilson 2009). The turnaround raised hopes of a rebound and the resumption of payments to AICF and according to Credit Suisse, these results are 'remarkable' (Rochfort 2009b)

For the release of the third-quarter results, the market for the shares closed higher as 'sentiment buoyed by the strongest quarterly increase in new home starts in eight years...certainly housing sector data was very strong and gives confidence to the way we're going' (Anon. 2010d). James Hardie posted an 87% slump in third-quarter profit from a stronger Australian dollar and weakness in the US housing market but was still forecasting a full-year profit, excluding asbestos payments, ASIC expenses and the cost of relocation, that would be at the 'top range of analysts' forecasts' (Anon. 2010d).

James Hardie raised its full-year earnings forecast and investors were 'awestruck', especially in a moribund US housing sector where finding a building materials maker that can 'at least tread water is a cause for relief' (Hutton 2009c)

Disclosure of asbestos liability

An Australian Manufacturing Workers spokesperson responded to the fines and bans handed down to the Board members saying James Hardie's previous board went to extraordinary lengths to avoid victims' compensation. 'They did that because they saw them as no more than a line item on a balance sheet – they didn't see them as real people...all current board members should attend a bedside hearing of a sufferer who is about to die from mesothelioma, so the next time they look at a line item they know that there's a real person behind it, there are real families behind it, and they understand that they have not just a legal obligation'. 'They have a moral obligation to victims to ensure that they are paid – they are compensated' (Anon. 2009h)

Asbestosis is a 'creeping death' that can 'take a lifetime to manifest', therefore companies such as James Hardie and CSR that carry a contingent asbestos liability are incapable of quantifying that liability (Jury 2010). 'Part of the price Hardie now pays for its bungled attempt to cut ties with its asbestos past is the publication of detailed actuarial reports, as required by the NSW legislation underpinning the fund' (Sexton 2009a). Extraordinary items, including a US\$200m unfavourable asbestos adjustment, pushed James Hardie to a loss for the nine months to 31 December 2009 (Hopkins 2010).

There was a concern, however, that companies, including James Hardie, were using non-statutory financial reports or 'underlying profit' statements that directors believed provided a more accurate representation of a company's performance. The audited financial statements were the 'official' numbers while the non-statutory metrics presented a 'clearer and usually better-story' (King 2010).

Exchange rate

During the first quarter, and at the time of the announcement that James Hardie would not make 'voluntary payments' because it

would breach banking covenants, the 'Aussie' dollar appreciated against the US dollar, further eroding any contributions to the AICF (Grigg 2009b).

The further appreciation meant that 'Asbestos liabilities, worsened by foreign exchange fluctuations, have dramatically slashed James Hardie's third-quarter headline profit, but the building products producer has lifted underlying earnings despite the severe US housing downturn' (Hopkins 2010). Each one-cent rise in Australian currency added another AU\$8m to the company's asbestos liability (Hutton 2009d).

Asbestos claims and settlements

The US housing crisis meant that for James Hardie sales were crumbling while claims from asbestos were on the rise (Grigg and Lee 2009). Net total claims for the nine months were AU\$72m (Hopkins 2010). Claims against James Hardie numbered 160 in first quarter (up from 151 in same period in the previous year) with 159 settlements at an average of AU\$180,602 per claim (lower than the corresponding period in the previous year) (Anon. 2009n). A case involving a James Hardie insurer was heard in the High Court. A former worker who had died from mesothelioma was awarded AU\$356,510 in damages (Eyers 2010b).

Contributing to the diminution of AICF funds was a single payment of AU\$4.1m, in the previous year, to a 39-year-old victim. This is thought to be the largest payment ever in Australia (Grigg and Boxsell 2009).

Payments to the AICF

Expensive legal fees including the ASIC case, payout to ATO and US housing market slump were draining James Hardie's resources. The ADF stated that James Hardie had a 'moral obligation to top this fund up and keep it going'. However, 'we have appealed to their morals before and it fell on deaf ears' (Lauder 2009)

There were calls to ask the government for a loan and calls by the ADF to use the ATO money from the AU\$153m dispute bailout to fund the AICF, however they were questioned. 'A taxpayer rescue would undermine the years of dogged work by many people to ensure James Hardie pays fair compensation to people poisoned by its products, from which it and its shareholders profited for most of the 20th Century'. The public should not abandon the slogan from 2004 'Make James Hardie Pay' (Sexton 2009e).

By the third quarter, the 'Asbestos Diseases Foundation says the latest cash-flow results from James Hardie is good news for victims of asbestos building products'. In the previous year the company did not pay into the compensation fund because of a negative operating cash flow. A spokesman for ADF said 'it takes a bit of the worry away, that Hardie are starting to finally come back into the black in regards to topping up the fund' (Anon. 2010b).

James Hardie actually paid 100c in the dollar to asbestos victims. 'Almost everywhere else – in South Africa, the US and Canada, where there are big asbestos mining and manufacturing operations – historically the companies are either completely liquidated or they are paying something derisory, like 5c in the dollar. We can only hope that for the victims of asbestos that over the next 40 years, Hardie continues to be profitable' (Grigg and Boxsell 2009).

EMPLOYMENT REPORT

Asbestos has been described as 'the worst workplace safety scandal in Australian history' (Draper 2009) and mesothelioma as a disease that has affected and will affect manual workers, 90% male (Smith 2010). As an example from the stevedoring industry, a counsellor from ADF said that wharf workers fell victim to asbestos because asbestos fell through the hessian bags in which it was transported. 'We lost so many wharfies because of this' (Glanville 2009). During Asbestos Awareness Week workers are encouraged to get tested for asbestos-related illnesses. Employers are required to provide health checks for employees exposed to hazardous substances at either the Dust Diseases Board or the mobile Lung Bus (Anon. 2009d).

The Australian Prime Minister used the government 'bailout' of the AICF as an opportunity to send 'a warning to all in corporate Australia...When it comes to your responsibilities for the safety of your workers, nothing, nothing, should ever allow that to occupy a second place...[i]t should be the first priority of every company' (Anon. 2009b). 'The underlying principle is this: you cannot simply stand idly by and allow innocent workers and their families and their loved ones to be trashed through the irresponsibility of a company' (Hawley 2009).

The draft national Safety at Work Act noted that executive and non-executive directors were now liable and responsible for Occupational Health and Safety (OH&S) as 'corporate concerns come after directors and non-executive directors of James Hardie were successfully prosecuted for signing off on a misleading press release about the company's asbestos fund' (Ryan 2009).

The cost of redomiciling to Ireland from the Netherlands had blown-out following a delay in approval from the company's European employees over the change. James Hardie had to become an SE before seeking employee approval and this gave employees more power because the company had to consult them on important decisions (Rochfort 2010). By February 2010, owing to 'ironing out concerns, including job security' with the European workers, the move to Ireland was delayed (Hutton 2010).

Indigenous workforce

There were efforts to develop a medical protocol for Aboriginal people affected by the asbestos mine at Baryulgil in northern NSW, which closed in 1970. The whole community was exposed and contamination from asbestos and the effects were described as 'really massive' (Anon. 2009m)

Laurence (2009) reports on the Wallaga Aboriginal community and the demolition of fibro homes under the Work for the Dole scheme. Workers were not told of health risks and that there was a potential hazard from asbestos waste left lying around. Workers may have had claims for compensation from James Hardie and CSR as producers of asbestos products.

CUSTOMERS AND PRODUCTS REPORT

Allegations of collusive behaviour between James Hardie and CSR emerged in a court case concerning Mr Berengo, who contracted mesothelioma from accompanying his father, a builder, to worksites with asbestos products in the 1970s. Counsel argued that:

over a considerable period of time, the two companies formed an asbestos industry in [Victoria] and this country, and they formed arrangements, agreements or an understanding to act together to influence the public debate on the dangers of asbestos and to influence regulatory authorities of the control of, and the use of, the asbestos (Wood 2010a).

The plaintiff planned to make both James Hardie and CSR liable by accusing the companies of collusion in disguising the dangers of asbestos by not putting brand names on products in the 1960s and 1970s and by cooperating to dissuade regulators from restricting asbestos (Wood 2010b)

Mr Reed, a former bricklayer, died from mesothelioma in 2009 and his estate sued Amaca. Counsel alleged that papers existed that proved that James Hardie cut asbestos dust from TV footage in its commercials to avoid products being branded as unsafe and that the company knew of consumer and trade group research into asbestos awareness (Thomson 2010).

The executor for the estate of Paul Cotton sued Amaca and two former employers at sites where Mr Cotton had been exposed to asbestos; he had subsequently contracted lung cancer from this exposure. Despite the Supreme Court's finding that all three defendants were negligent, the case was overturned on Appeal (Anon. 2010c). On appeal, the High Court ruled that a long-time smoker was more likely to have died from cancer caused by cigarettes than exposure to asbestos (Anon. 2010c). Lawyers for the estate of Paul Cotton argued that epidemiological evidence showed asbestos exposure combined with tobacco smoke caused the cancer. Mr Cotton had smoked 15 to 20 cigarettes a day for 26 years and the judges ruled that asbestos may have been a cause but not a probable cause in this case (Nunis 2010), essentially making it more difficult for asbestos victims who have smoked to claim compensation for cancer (Priest 2010).

COMMUNITY REPORT

Asbestos-related disease has a lag time of 20 to 40 years and the death toll is expected to peak between 2014 and 2021. Sufferers of mesothelioma live on average 155 days from diagnosis and in that time 'sick people need to engage a lawyer, wait for the matter to drag through the legal system and risk losing more money [than] they could potentially win' (Smith 2010). In addition, 'people unfortunately are becoming younger and younger with the diagnosis of this asbestos disease and often they're leaving behind a spouse and young children' (Hawley 2009).

Following the ASIC case in April 2009, James Hardie was described as a '[c]ompany with a history of disgraceful and immoral behaviour. They exposed people when they knew of the dangers'. 'They never warned their employees, they never warned the purchasers of their products, and then they tried to leave the country without leaving adequate compensation to pay for its victims' (Segalov lawyer for Banton quoted in Peacock 2009b).

'My mum was an unlucky case of mesothelioma...an industrial expert surmised that she had been exposed as a child...Like many men [her father] who unknowingly carried home asbestos fibres on their clothing for their wives to wash or children to inhale when hugging them, his work with plumbing supplies made with asbestos is probably the reason my mum is gone'. The company

responsible for manufacturing asbestos, despite knowledge of the risks, still trades on (Smith 2010).

A 10-year arrangement between James Hardie and CSR regarding the apportionment of funding for asbestos litigation was cancelled in October 2009. The apportionment was roughly based on market share at the time (Rout 2009). Also, it is not unusual for cross-claims to be made in asbestos cases (Elks 2009b). For example, legal action was taken against CSR over the case of a fitter and turner between 1964 and 1974, when Amaca was in partnership with CSR to manufacture and distribute asbestos products (Elks 2009a). Plaintiffs are now asked to identify the specific product used but this is difficult for 'third wave' sufferers such as housewives or renovators. Slater and Gordon say '[i]t's cruel, inhumane and these are corporate giants carrying on like kids in a school yard [and] that has an effect on these poor people' (Rout 2009).

James Hardie attempted to sue the Ipswich local government for AU\$200,000 paid by James Hardie to a former council worker for illness caused by asbestos. The mayor called it an 'un-Australian shonky tactic' to blame the workplace rather than the product (Elks 2009b). 'This is the same company that moved all of its assets off-shore to avoid any payment of any liability to its workers – now it's attacking the ratepayers of Ipswich – disgraceful' (Lloyd 2009)

A grandmother posthumously won a landmark payment of AU\$500,000 from James Hardie after a court upheld a Dust Diseases Tribunal award of AU\$350,000 in compensation and nearly AU\$193,000 for her services as a carer (unpaid wages as a carer for her grandchildren) after contracting mesothelioma. The woman contracted mesothelioma from washing her father and husband's clothes over a period of 20 years. Although James Hardie fought 'tooth and nail all the way through', this case opened the way for other wives and mothers, as carers, to get compensation (Sims 2009).

ENVIRONMENTAL REPORT

The book *Killer Company* by Matt Peacock (2009c) revealed that, for 30 years, hessian bags used to carry asbestos were recycled and used as carpet underlay. Minutes from James Hardie meetings also revealed that the company knew about the practice. The ADF president has argued that: '[u]s poor buggers work in the industrial side of the asbestos. We'll all be dead in another 10, 15 years from it, but it's the renovators, the home renovators, the young people that are renovating their homes. They're dragging up these carpets without any protection and most probably have their young kids with them' (Glanville 2009). This news broke at the time of the plan to redomicile; 'I do hope the board gets a tour of Irish pubs. Perhaps they can raise the money for the dying victims with a raffle. First prize, three quarts of Guinness. Second prize, some carpet underlay. Used' (James 2009).

Also in the book is a story about workers who were encouraged to take asbestos waste to build domestic driveways, paths and garage floors. For example, there is the story of a man whose mother died of mesothelioma following exposure to asbestos from a driveway made by her husband, a James Hardie employee (Anon. 2009c). Peacock (2009c) also alleged that James Hardie did not want the liability of cleaning up dangerous material left in the environment.

Appendix 4

CSR Limited Silent Report 1 April 2009 – 31 March 2010

Report collated from publicly available information in the corporate accounts and official website relating to the issue of asbestos.

MISSION AND POLICY

Asbestos liabilities

CSR Limited (CSR) and certain subsidiaries were involved in mining asbestos and manufacturing and marketing products containing asbestos in Australia, and exporting asbestos to the US. CSR's involvement in asbestos mining, and the manufacture of products containing asbestos, began in the early 1940s and ceased with the disposition of the Wunderlich asbestos cement business in 1977. As a result of these activities, CSR has been named as a defendant in litigation in Australia and the US.

In 2010, CSR's chairman also reinforced the company's continued responsible approach to managing asbestos claims (CSR 2010a: 1): in that year there were cash payments of AU\$38.4m, reduced from AU\$46.6m the previous year – owing to lower settlements in the US. The product liability provision reported was based on semi-annual expert advice from US and Australian experts (CSR 2010d: 8).

Demerger proposal

The CSR proposed demerger of its sugar business is presented in the chairman's report as a strategy to create additional shareholder value.

After an extensive 12–18 month due diligence period, we announced in June 2009 that we would pursue a demerger of our Sucrogen business. The due diligence process included extensive work and independent assessment to enable the board to conclude that following the demerger, CSR would continue to be able to meet our asbestos liabilities in the same responsible manner we have done for over the past 20 years (CSR 2010a: 1).

The sentiment about the strategy was summed up by the chairman:

Your board believes that a demerger will facilitate realisation of the value of these businesses for shareholders over time (CSR 2010e: 3).

CORPORATE GOVERNANCE

Separation of sugar business

From the Chairman's report:

In recommending the demerger proposal, the board undertook a significant amount of due diligence to conclude that post demerger, CSR would continue to be in a position to meet its responsibilities.

I personally chaired this due diligence committee, so I know firsthand just how much work went into this area. Quite simply, we would not even contemplate a proposal where we did not have confidence in CSR's ability to meet ongoing claims, and that is a continuing commitment by the board in developing any future proposals (CSR 2010a: 3).

In pursuing the demerger proposal, CSR's future asbestos liabilities became an issue. This was responded to by senior management in the Annual Report.

For more than 20 years, CSR has consistently and responsibly met asbestos liabilities. We pay claims where we have a demonstrated liability and we maintain a provision on our balance sheet to cover all known claims and reasonably foreseeable future claims. We have never shirked our responsibility, nor have we ever attempted to ring-fence claims or limit the amount which is available to meet claims. I think it's fair to say that the community in general recognises that CSR has followed a responsible approach to this issue for over 20 years (CSR 2010e: 5).

ASIC and CSR have made substantial progress in working through a considerable amount of detailed material, including independent expert reports relating to the disclosure of asbestos liabilities in the draft scheme booklet for the proposed demerger (CSR 2010g:1).

CSR Limited advises that it continues to progress discussions with ASIC relating to the disclosure of asbestos liabilities in the scheme booklet for the proposed demerger of its Sugar and Renewable Energy business (CSR 2010b: 1).

Federal Court hearing on separation

The approvals process for a demerger requires Federal Court approval for CSR to convene a meeting of shareholders to vote on the demerger proposal. Given the significant degree of due diligence we had completed, we were extremely disappointed that the court initially denied our application.

We appealed that decision on the basis that the decision contained errors in law and the full Federal Court has since set aside the judgement at the first court hearing and ordered that CSR can convene a meeting of shareholders to consider the demerger proposal (CSR 2010a: 1).

Retirement of CEO

Jerry Maycock retired as managing director at the end of the financial year, and consistent with our new operating structure, the board invited non-executive director Jeremy Sutcliffe to assume the position of managing director for an interim period of up to 12 months from 1 April 2010 (CSR 2010a: 1).

ECONOMIC REPORT

In relation to 2010 financial results CSR reported that it represented a good underlying result in continued difficult markets (CSR 2010d).

Our reported result was a net loss of AU\$111.7m after significant items which amounted to AU\$300.2m. They included a AU\$250m write-down of goodwill in the Viridian glass business, costs associated with the proposed demerger and a charge to maintain the prudent level of the [asbestos] product liability provision (CSR 2010a: 1).

Capital raising

Part of our due diligence in recommending a demerger proposal to shareholders was to ensure that the two separate companies would be appropriately capitalised with the right levels of debt. We undertook the capital raising to ensure that both CSR and Sucrogen would have the financial flexibility to pursue their stand-alone strategies to create value for their respective shareholders after the demerger. In conducting the equity raising we were able to introduce the concept of a simultaneous renounceable entitlement offer, which provided the same outcome for retail and institutional shareholders for their entitlements. (CSR 2010a: 3).

Disclosure of asbestos liabilities

CSR includes in its financial statements a product liability provision covering all known claims and reasonably foreseeable future asbestos related claims. This provision is reviewed every six months. The provision recognises the best estimate of the consideration required to settle the present obligation for anticipated compensation payments and legal costs as at the reporting date. The provision is net of anticipated workers' compensation payments from available workers' compensation insurers. CSR does not believe there is any other source of insurance available to meet its asbestos liabilities. CSR no longer has general insurance coverage in relation to its ongoing asbestos liabilities.

In determining the product liability provision, CSR has obtained independent expert advice in relation to the future incidence and value of asbestos related claims in each of the United States and Australia. CSR has appointed Taylor Fry Pty Limited, consulting actuaries, as the independent expert to estimate the Australian liabilities. CSR has appointed Navigant Consulting, Inc as the independent expert to estimate the United States liabilities. The independent experts make their own determination of the methodology most appropriate for estimating CSR's future liabilities.

The assessments of those independent experts project CSR's claims experience into the future using modelling techniques that take into account a range of possible outcomes. The present value of the liabilities is estimated by discounting the estimated cash flows using the pre-tax rate that reflects the current market assessment of the time value of money and risks specific to those liabilities.

Many factors are relevant to the independent experts' estimates of future asbestos liabilities, including:

- numbers of claims received by disease and claimant type and expected future claims numbers, including expectations as to when claims experience will peak;
- expected value of claims;
- the presence of other defendants in litigation or claims involving CSR;
- the impact of and developments in the litigation and settlement environment in each of Australia and the United States;

- estimations of legal costs;
- expected claims inflation; and
- the discount rate applied to future payments.

There are a number of assumptions and limitations that impact on the assessments made by CSR's experts, including the following:

- assumptions used in the modelling are based on the various considerations referred to above;
- the future costs of asbestos related liabilities are inherently uncertain for the reasons discussed in this note;
- uncertainties as to future interest rates and inflation;
- the analysis is supplemented by various academic material on the epidemiology of asbestos related diseases that is considered by the experts to be authoritative;
- the analysis is limited to liability in the respective jurisdictions of Australia and the United States that are the subject of the analysis of that expert and to the asbestos related diseases that are currently compensated in those jurisdictions; and
- the effect of possible events that have not yet occurred which are currently impossible to quantify, such as medical and epidemiological developments in the future in treating asbestos diseases, future court and jury decisions on asbestos liabilities, and legislative changes affecting liability for asbestos diseases (CSR 2010a: 59).

In Australia, the methodology used by Taylor Fry Pty Limited produces a range of potential outcomes, including a central estimate, or most likely outcome. At 31 March 2010, the central estimate was AU\$184.8m calculated using a discount rate of 6%. On an undiscounted and inflated basis, that central estimate would be AU\$385.3m over the period to 2060, being the period that the Australian independent expert advises CSR is relevant for the estimation of CSR's future Australian asbestos liabilities.

In the United States, the methodology used by Navigant Consulting, Inc produces a base case estimate or most likely outcome. At 31 March 2010 the base case estimate was US\$159.5m calculated using a discount rate of 4.5%. On an undiscounted and inflated basis, that base case estimate would be US\$240.5m over the anticipated further life of the United States liability (45 years).

The product liability provision is determined every six months by aggregating the Australian and United States estimates noted above, translating the United States base case estimate to Australian dollars using the exchange rate prevailing at the balance date and adding a prudential margin.

The prudential margin is determined by the CSR directors at the balance date, having regard to the prevailing litigation environment, any material uncertainties that may affect

future liabilities and the applicable long term Australian dollar to United States dollar exchange rate. As evidenced by the analysis below, due, in particular, to the fluctuations in exchange rate, the prudential margin has been variable over the past five years.

The directors anticipate that the prudential margin will continue to fluctuate within a range approximating 10% to 30% depending on the prevailing circumstances at each balance date (CSR 2010a: 60).

Asbestos claims and settlements

In Australia, asbestos-related personal injury claims have been made by employees and ex-employees of CSR, by others such as contractors and transporters and by users of products containing asbestos. As at 31 March 2010, there were 692 such claims pending.

In the United States, claims are made by people who allege exposure to asbestos fibre used in the manufacture of products containing asbestos or in the installation or use of those products. As at 31 March 2010, there were 1,147 such claims pending.

CSR has been settling claims since 1989. As at 31 March 2010, CSR had resolved 2,762 claims in Australia and approximately 135,200 claims in the United States.

The annual amounts paid by CSR in respect of asbestos related claims vary year on year, depending on the number and types of claims received and resolved during each year, the litigation or other determination of particular claims or issues, and any determination by management to resolve claims that may have been received in earlier years (CSR 2010a: 59–60).

Reaction to Federal Court decision blocking separation

No comment was made by CSR regarding the adverse effect of the initial Federal Court decision on its share price.

CUSTOMERS AND PRODUCTS REPORT

Manufacturing partnership with James Hardie Industries SE

No specific disclosures were made relating to the manufacturing partnership with James Hardie Industries SE.

Asbestos compensation claims

CSR Limited and/or certain subsidiaries (CSR) were involved in mining asbestos and manufacturing and marketing products containing asbestos in Australia, and exporting asbestos to the United States. As a result of these activities, CSR has been named as a defendant in litigation in Australia and the United States. At 31 March 2010, a provision of AU\$455.3m (2009: AU\$455.1m) has been made for all known claims and reasonably foreseeable future claims (CSR 2010a: 35).

COMMUNITY REPORT

The Board has endorsed a Code of Business Conduct and Ethics that formalises the longstanding obligation of all CSR people, including directors, to behave ethically, act within the law, avoid conflict of interest and act honestly in all business activities.

CSR's Code of Business Conduct and Ethics reinforces the company's commitment to giving proper regard to the interests of people and organisations dealing with the company. Each CSR person is required to respect and abide by the company's obligations to employees, shareholders, customers, suppliers and the communities in which we operate (CSR 2010f: 7).

Asbestos claims

In the context of the recent Federal Court decision, shareholders should be assured that the Board, in considering separation proposals, will continue to take into full account the interests not only of shareholders but of all stakeholders, including those with a relevant interest in the asbestos issue (CSR 2010c: 1).

Appendix 5

CSR Limited Shadow Report 1 April 2009 – 31 March 2010

Report collated from publicly available information in the corporate accounts and official website relating to the issue of asbestos.

MISSION AND POLICY

Asbestos liabilities

Concerns were raised about the corporate restructuring in relation to the future of the asbestos liabilities. As an example, the high profile plaintiff legal firm weighed into the debate pointing out:

[r]ecent reports suggest CSR will hive off its asbestos liability to the building entity. Mr Gordon said CSR must learn the lessons of the disastrous James Hardie restructure that saw its executives try to abandon asbestos victims (Slater and Gordon 2009).

Media commentary about the restructuring plans for CSR focused on the uncertainty surrounding estimates of asbestos liabilities.

It's thought that the sugar division will take about AU\$450m in debt with the remaining AU\$750m left in the building products-focused entity. Meanwhile future asbestos liabilities are estimated at AU\$455m in CSR's accounts as at March 31, 2009. On this note, the GSJBW [Goldman Sachs JBWere] team reckon the new building products division will have to provide an indemnity to the demerged sugar business against any liabilities going forward (Thompson 2009).

Demerger proposal

The proposed demerger of the sugar business was complicated further by an offer from Chinese food group, Bright Food, for a trade sale.

Rothschild Australia advised China's Bright Food Group on a bid for CSR's sugar division, cheekily timed to capitalise on uncertainties around the demerger caused by the corporate plod's queries about funding asbestos victims (White 2010).

With a quick return in the offing, some will want CSR to take the money and spike the split. Others will prefer it to wait for the business to be spun off and, free of legal liabilities for asbestos poisoning, sell at a potentially higher price to another bidder...[and]...don't forget ... investors are betting on the sugar unit's financial prospects being re-rated, and becoming more attractive to bidders separated from CSR and its asbestos liabilities (Whyte 2010).

In fact, CSR rejected the offer, preferring to split the company into two listed entities (Ooi 2010a). A second bid after the Federal Court rejection of the separation was also rejected.

CORPORATE GOVERNANCE

A weighty issue for the board [in relation to the separation of the sugar business] is whether to keep the CSR (Colonial Sugar Refineries) name. Also on the laundry list is where to stick AU\$280m of asbestos liabilities. The intention is to keep them with the building materials side – as is logical – but watch out for James Hardie-style funny business (Boreham 2009).

Separation of sugar business

On 17 June 2009, CSR announced plans to spin off its sugar and energy units into a separate listed entity (Anon. 2009a). 'Early concerns have emerged yesterday about where the group's debt and asbestos provisioning will be parked' (Smith 2009b). On 17 December 2009, the NSW government intervened in the separation by seeking leave from the Federal Court to stop the proposed demerger because of the effect the demerger would have on the ability of the demerged entity to compensate asbestos victims (Carswell 2009).

When James Hardie skipped the country in 2001 and left its asbestos fund without sufficient money to pay claims, the NSW government was forced to intervene. It doesn't want to a second time. That is why Attorney-General John Hatzistergos has moved to ensure CSR's planned spin-off of its sugar division will have no adverse effect on asbestos victims. Nothing short of an iron-clad guarantee from CSR that it can fully fund its liabilities will suffice (Grigg 2009a).

The Australian corporate watchdog, the Australian Securities and Investments Commission (ASIC) intervened requesting that more detailed disclosure of information about the asbestos liabilities be distributed to shareholders before a vote on the demerger.

The demerger of CSR's sugar business has hit a hurdle with a Sydney court adjourning a hearing on the matter to allow the corporate watchdog more time to study the proposal. In the first hearing in the Federal Court on Thursday, the Australian Securities and Investments Commission requested an adjournment to allow it more time to review information provided by CSR relating to disclosure in the demerger scheme booklet about asbestos liabilities. ASIC reportedly has concerns about the lack of information in the scheme booklet about CSR's provisions for asbestos liabilities after the proposed demerger (Anon. 2009g).

Federal Court hearing on separation

CSR needs court permission before it can hold a shareholder vote to approve the plan that was first announced in June. The court must determine whether creditors and future asbestos claimants would be hurt by the move. Last month the NSW Attorney-General called on the Australian Securities and Investments Commission to ensure the remaining building materials business would be able to meet its liabilities to people poisoned by its asbestos products (Hutton 2010e).

CSR's plan to undertake a fairly simple and uncontroversial split of the company into its broad sugar and building products-related constituent parts has somehow been dragged off the plotted path and may even be in danger of becoming mired in the same sort of asbestos liability swamp that James Hardie Industries got stuck in. So great a bogey has asbestos liability become in the wake of the fallout from James Hardie's restructuring, and particularly following a rare successful prosecution brought by the Australian Securities and Investments Commission against certain former directors and executives, that all authorities asked to approve anything even remotely touching on it tend to walk on eggshells. The biggest bone of contention surrounds the amount of disclosure by Hardie, since deemed to have been inadequate (Jury 2010).

Reports about the hearing confirmed the hard line taken by authorities to protect asbestos claimants.

The court has also concluded that the potential disadvantage to those having asbestos-related claims is such that a demerger is inconsistent with public policy and commercial morality', Justice Stone told the Federal Court in Sydney. 'After demerger CSR would be less likely to be able to meet its future asbestos liabilities.' The judgment said the court was not clearly satisfied there had been proper disclosure in CSR's explanatory statements of its demerger scheme of the impact of future asbestos compensation claims on the new CSR. 'It was accepted on all sides that actuarial evidence is necessarily inconclusive especially where it concerns future claims that have not yet materialised,' Justice Stone told the court (AAP 2010).

Interestingly, even James Hardie did not want CSR's capacity to contribute to asbestos claims impaired by the demerger.

An unlikely coalition of the NSW government and James Hardie has helped scuttle a plan by the former asbestos miner and manufacturer CSR to split into two companies. A Federal Court judge said yesterday the potential impact of the proposed demerger on people who fall ill from exposure to CSR asbestos offended 'public policy and commercial morality'. Justice Margaret Stone stopped the restructuring at its first legal test by rejecting CSR's application for an order convening a shareholder meeting (Sexton 2010f).

CSR's corporate strategy is in disarray after the Federal Court blocked the demerger of its sugar business, saying it could disadvantage victims of asbestos poisoning and was inconsistent with public policy and commercial morality. Judge Margaret Stone ruled that CSR's proposed split of its building materials and sugar units into separate public companies could leave the former with a capital base too small to compensate victims if conditions deteriorate and claims balloon (Hutton 2010b).

The Federal Court's rejection of CSR's demerger proposal is a legal, corporate and most importantly of all, practical nonsense...While Justice Stone's arithmetic is impeccable, her legal and broader reasoning is not. It's the muddled thinking of the 'James Hardie Effect'. That because Hardie engaged in a corporate restructure which led to it being unable to pay its asbestos liabilities, the theoretical reduction in CSR's ability to pay its liabilities should stop its restructure (McCann 2010).

An appeal against Justice Stone's February decision was heard before the Full Bench of the Federal Court on 29 and 30 March.

The Asbestos Injuries Compensation Fund (AICF) has told the full bench of the Federal Court that the court's earlier decision to dismiss CSR's application to put a demerger proposal to a shareholder vote was correct (Cratchley 2010).

Nonetheless, CSR, represented by Neil Young, QC, 'argued that Justice Stone "appears to have taken a sweeping view of her discretion to refuse to order scheme meetings"' (Ooi 2010b).

Though routine for any company seeking to spin-off part of a business, for CSR the hearing is sensitive owing to the compensation it has been paying to victims of asbestos-linked diseases for more than two decades. The company has been at pains to avoid criticism it is not facing up to its asbestos liabilities. It has received extra scrutiny because of the claims (Hutton 2010a).

As a CSR shareholder I am appalled at the ruling of the judge with respect to the right of CSR to demerge into a building company and a sugar company. The ruling seems to be more interested in ensuring the right of claimants affected by asbestos rather than what is in the best interests of shareholders. While third party creditors have rights and CSR has made adequate provision for them, what right has a judge to determine whether the cash received from the sale of the sugar assets is a lesser earner than the sugar assets themselves. Surely this is a question for the shareholders, not the courts. Individuals have rights that should not be taken away by bureaucrats and the court system (Hauff 2010).

Retirement of CEO

Mr Maycock (managing director or CEO) was appointed for a three-year term. The term expired on 31 March 2010.

Mr Maycock (CSR Managing Director) was appointed with a mandate to separate the company's sugar and building materials, which have been burdened with large financial liabilities for people poisoned by asbestos made by CSR (Hutton 2010d).

Many people had believed that Mr Maycock would remain until the successful completion of the separation strategy.

Jerry Maycock's news that he was stepping down as managing director of CSR and the colossal shrug from investors was telling. With his company's plans to hive off its sugar business in disarray, Maycock said he was leaving as scheduled on March 31, to spend more time with his family. The departure shows [that] the drive to separate the company into its building material and sugar businesses was driven at board level and probably had deep roots at CSR (Hutton 2010c).

ECONOMIC REPORT

Banks are not the only companies suffering from falling property values, building products and sugar producer CSR's bottom line has also been hit hard by the housing downturn, with the company posting a AU\$327m annual net loss (Anon. 2009f).

Capital raising

CSR undertook Australia's first Simultaneous Accelerated Renounceable Entitlement Offer (SAREO) in order to pay down debt and fund the company's demerger plans. 'The raising comes as the company reported a AU\$155.6m net loss for the half year to September, after taking a AU\$250m charge on the value of Viridian, the glass business' (Murdoch 2009). This structure of offer was designed to put retail shareholders on a more equal footing with institutional investors. '[N]ot a whole lot of the AU\$90b recapitalisation of corporate Australia since the GFC has occurred on terms that treated retail shareholders anything like equally with institutional shareholders' (Stevens 2009).

Disclosure of Asbestos Liability

Reports commenting on CSR's 2009 results suggested that the market was aware of the two major financial burdens of CSR, one being asbestos provisioning. 'The Viridian write down and a rise in the company's asbestos liability provisions (also included as a significant item) were well-flagged' (Forrestal 2009).

'In its September accounts CSR said it had asbestos provisions of AU\$446.8m and 641 claims pending in Australia...This means its asbestos liabilities will account for about 20 per cent of its value [after the demerger]' (Grigg 2009b).

Asbestos claims and settlements

The decision by Justice Margaret Stone to 'scuttle' the separation strategy of CSR was welcomed by the NSW government, but supporters suggested that CSR had a 'history of facing up to the financial implications of its deadly former business', for example:

former chief executive Alec Brennan said CSR had been 'meticulous in terms of its disclosures to the market about its asbestos liabilities, the accuracy of those disclosures and its obligations to meeting genuine claims' (Eyers 2010a).

CSR stopped mining asbestos in 1966 and ceased supplying asbestos products in 1977. Over the past 20 years it has been writing cheques to thousands of sufferers of the debilitating disease: 137,661 cases in total, mostly in the United States, with another 1913 outstanding as at September 30 last year. In the 4.5 years to September 30, CSR paid out AU\$150.4m to asbestos victims. It also recognised a provision in its accounts for the half year ending on September 30, 2009, of AU\$446.8m – which represented 10 per cent of the company's net assets (Eyers 2010a).

The value of CSR's asbestos liability and the ability of the split entity, 'new CSR', to fund future claims was the central issue when the Federal Court heard the appeal against the initial decision of Justice Margaret Stone not to allow shareholders to vote to separate the company's sugar and renewable energy businesses from its building products business. Mr Young, barrister for CSR, made a case that the risk that the new CSR would not have the ability to pay asbestos claims was small. 'The annual asbestos exposure runs in the order of AU\$30m to AU\$50m a year or if you take the highest estimates AU\$60m or AU\$70m for only a couple of years and then tails off,' Mr Young said' (Sexton 2010b)

The funding body set up to pay claims after the James Hardie restructuring in 2001, the Asbestos Injuries Compensation Fund (AICF), attacked the calculation of CSR's asbestos liability on two fronts. The AICF questioned, first, the company's ability to pay in the face potential economic downturns and, second, its estimation of its asbestos liabilities:

Mr Meagher [counsel for AICF] said there were deficiencies in the expert reports CSR had tendered, particularly a 'one-year shock test' prepared by investment bank Goldman Sachs JBWere which showed the 'new CSR' would have sufficient cash flow to pay asbestos compensation if an economic downturn coincided with a worst-case peak in claims. He said

the bank had been asked to do 'the mathematics' based on assumptions provided by CSR without 'evidence from anybody outside CSR'. One of those assumptions was that the 'shock' assumed to occur next year would not run into a second or third year. 'Goldman Sachs were not asked to express a view about it,' Mr Meagher said. 'One might expect they could have and one might suggest they should have.' He criticised differences between assumptions used in the model and figures for next year in a five-year business plan CSR has adopted. These included a AU\$25m rise in revenue and cost cuts of up to AU\$100m. There was nothing before the court 'other than a bare assertion' from CSR to justify the revenue assumption, Mr Meagher said. As for the spending cuts, 'they have in effect allowed themselves to see what [external shock] was coming and to make allowances by cutting discretionary spending,' he said. The court has heard that six reports by actuarial experts estimate CSR's annual asbestos payments in peak years could range between AU\$31m and AU\$74m. CSR's barrister, Neil Young, QC, responded that Goldman Sachs had carried out 'a very strong stress test' based on 'a very sudden, savage downturn involving multiple events that are most unlikely in the real world to coincide'. The model did not assume an 'instantaneous recovery' from the shock, he said, and the cuts in discretionary spending were 'a small selection of savings in cash outflows of a kind that could be implemented within three months' (Sexton 2010c).

Claims that actuarial estimates were inadequate were also questioned by counsel for the AICF at the appeal.

CSR set aside AU\$447m for asbestos claims as of 30 September 2009. KPMG, [which] was hired by AICF to review reports from Taylor Fry and Navigant, recommended [that] CSR set aside AU\$897m on worries claims could climb faster than inflation. Taylor Fry failed to account sufficiently for the so-called 'third wave' of claimants who unknowingly came into contact with asbestos from home renovations and even contact with clothes that were coated with the material, Mr Meagher said (Sexton 2010c).

Reaction to Federal Court decision blocking separation

Fearing an adverse market reaction to the blocking of the demerger process by the Federal Court:

CSR has entered into a trading halt after the Federal Court ruled against its plan to de-merge over worries that offloading its AU\$1.5b sugar business might affect its abilities to pay out asbestos liabilities. In a huge setback for the company, the court concluded the de-merger was 'inconsistent with public policy and commercial morality' (Freed and Forrestal 2010).

A federal court decision to block CSR's plans to divest its sugar and renewable energy business has brought mixed reactions from analysts. The court expressed concern that a CSR stripped of its sugar business may encounter difficulties meeting its future asbestos liability obligations, of which CSR has a AU\$446m provision on its balance sheet. UBS slashed its recommendation on the stock from 'buy' to 'neutral' and its 12-month target price from AU\$2.10 to AU\$1.85 (Ciampa 2010).

After the lifting of the trading halt on CSR shares, some 52.4 million shares went through the market, compared with normal daily volumes of five to 10 million, and the share price finished the day down 12, or 6.5 per cent, at AU\$1.725 (Grant-Taylor 2010).

By February 25 '[t]he stock has fallen 12 per cent since the Federal Court's February 3 block of the split, with analysts attributing the slump to the demerger delay' (Bennet 2010).

CUSTOMERS AND PRODUCTS REPORT

In some ways, CSR limited is the more notorious asbestos manufacturer due to its operation of the Wittenoom asbestos mine. It could be said that CSR is the James Hardie of the 1980s (Jones 2009).

Manufacturing partnership with James Hardie Industries SE

Industrial giant, James Hardie Industries SE (James Hardie) commenced action against CSR on the basis of shared liability for asbestos products manufactured while CSR was in partnership with James Hardie (Elks 2009b). The manufacturing subsidiary of James Hardie (now known as Amaca) filed legal action against CSR claiming it had entered into a partnership with CSR in 1964 which had lasted until 1974, to manufacture, distribute and sell asbestos-related products and, hence, CSR should share equally any liability and legal costs.

An arrangement between James Hardie and CSR regarding the apportionment of funding for asbestos litigation ceased in 2008. The apportionment was roughly based on market share at the time (Rout 2009). It is not unusual for cross-claims to be made in asbestos cases (Elks 2009b). For example, CSR was named in legal action over the case of a fitter and turner between 1964 and 1974 when Amaca was in partnership with CSR to manufacture and distribute asbestos products (Elks 2009a). As a result, plaintiffs are now asked to identify the specific product used but this is difficult for 'third wave' sufferers such as housewives or renovators. This results in '[c]ompensation claims to dying asbestos victims...being delayed by legal feuding between Australia's two asbestos manufacturers, James Hardie and CSR, over how they will share financial liability' (Rout 2009).

Asbestos compensation claims

The High Court has made it harder for asbestos victims to claim compensation, yesterday ruling that scientific evidence about the incidence of cancer among those exposed to the deadly material was insufficient to prove liability of asbestos manufacturers. The decision in the case of cancer sufferer Paul Cotton is being seen as a key test case of the liability of asbestos companies where a cancer victim was also a smoker. The decision is a win for James Hardie and CSR, which can now more easily argue that if a cancer victim smoked as well as being exposed to asbestos then there is no direct proof that their products were at fault (Priest 2010).

Allegations of collusive behaviour between James Hardie and CSR emerged in the court case of Mr Berengo, who contracted mesothelioma from accompanying his father, a builder, to worksites with asbestos products in the 1970s. Counsel argued that:

over a considerable period of time, the two companies formed an asbestos industry in [Victoria] and this country, and they formed arrangements, agreements or an understanding to act together to influence the public debate on the dangers of asbestos and to influence regulatory authorities of the control of, and the use of, the asbestos (Wood 2010a).

The plaintiff planned to make both James Hardie and CSR liable by accusing the companies of collusion in disguising the dangers of asbestos by not putting brand names on products in the 1960s and 1970s and by cooperating to dissuade regulators from restricting asbestos (Wood 2010b).

COMMUNITY REPORT

Corporate disclosures about asbestos rarely acknowledge the 'human side' of asbestos disease.

One thing is certain, the human toll of asbestos exposure is immense and continues to increase on an annual basis. The peak incidence of mesothelioma is not predicted to be reached until 2020. There are few rainbows on the horizon for those who become ill after asbestos exposure. But Wednesday was a victory for people who deserve financial certainty when their life has been so compromised by past corporate wrongs (Dimsey 2010).

Asbestos claims

'The potential disadvantage to those having asbestos-related claims is such that the demerger is inconsistent with public policy and commercial morality,' Justice Stone said. 'After the demerger, CSR would be less likely to meet its future asbestos liabilities' (quoted in Hutton 2010f).

NSW Attorney-General John Hatzistergos welcomed the judgment. 'The court's decision today is a win for asbestos victims', he said in a statement. 'The NSW government will continue to have a strong interest in ensuring justice for victims of asbestos-related diseases', he said (AAP 2010).

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