Institute of Actuaries of Australia

Paying for Asbestos

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Synopsis

The aim of this paper is to provide an overview of the compensation available to persons affected by asbestos disease and the mechanics in Australia for obtaining such compensation. The paper considers the current state of asbestos compensation and suggests the future direction, options and alternatives for compensation.

In considering the current state and future direction of compensation in Australia, this paper considers the compensation regimes in the various Australian states and also examines other jurisdictions, particularly the USA and the UK. There can be marked differences in the compensation regimes, and the preference of one form of regime over another depends on the stakeholder strengths. The question asked is whether it is desirable to retain the current court based system that awards claimants common law damages, or whether it is preferable to adopt an administrative based system.

Recent developments in Australia and abroad suggest that the retention of the court-based system is unsustainable and inequitable, and on balance, it is desirable to most stakeholders to implement an alternative. Based on a stakeholder analysis it is readily apparent that the interests of claimants and defendants, and other stakeholders aligned interests, can be diametrically opposed. Accordingly, the preferred solution is not a simple case of retaining a court-based approach or implementing an administrative approach. The solution probably lies somewhere in between.

The paper comments on various options for asbestos compensation and looks at the issues involved in such options including scope, assessment, benefit structure, funding and governance. Barriers to change are also examined as well as likely stakeholder views as to the different options.

1. Introduction

1.1 Paper objectives

The aim of this paper is to provide an overview of the current state of asbestos compensation and suggest the future directions, options and alternatives for compensation. To this aim the paper does not aim to be a technical paper, but rather a paper dealing with policy. The issue therefore of appropriate estimation of asbestos-related outstanding claims has not been discussed in this paper, except insofar as it touches this paper's objective.

It is a timely moment to consider an alternate approach to compensation of persons affected by asbestos in light of the recent Special Commission of Inquiry of the Medical Research & Compensation Foundation ("Commission of Inquiry"). The issues raised by the Commission of Inquiry focused on the circumstances surrounding a corporate restructure of one of Australia's largest asbestos manufactures. Whilst the enquiry did not aim to resolve the Australian market's asbestos problems, it did however raise the public profile of the asbestos difficulties, and affirm that the current regime is unsatisfactory given that there may be asbestos victims that are left uncompensated.

1.2 Experience to date

To examine the future options we have firstly given an overview of the past. Section 2 of the paper therefore provides a brief summary of past experience including the nature of exposure and disease, the difficulty of estimation and the defendants involved.

Section 3 of the paper then examines the current mechanisms of dealing with asbestos, as well as a summary of overseas structures. Finally some discussion on insolvency regimes is provided.

1.3 Compensation Structure

Section 4 of the paper details the many issues that need be addressed when determining how compensation for asbestos-related diseases should be structured. Definitions as to scope of coverage, method of assessment, benefit structure, funding issues and governance are all discussed.

1.4 Solutions

When determining solutions, barriers to change need first be examined. The main barriers of legal inconsistency and contribution agreement are dealt with in Section 5. Section 6 of the paper then canvasses various solutions and looks at their advantages and disadvantages compared to the objectives sought. Section 7 then discusses the impact of each option on stakeholders.

1.5 Waiver

Asbestos Disease and Compensation in Australia is an evolving and complicated issue. Difficulties arise when applying complicated factual situations to an

uncertain legal, political, economic, legislative and social matrix. Subjective assessments and judgements are made in this paper that ultimately may not be correct.

1.6 Acknowledgments

Thanks should be given to Lindsay McGregor of Allianz Australia who helped to refine the author's ideas on this complex subject. Thanks should also be given to Peter McCarthy who contributed comments and insights.

Although we note the contributions above, the views expressed in this paper are those of the authors alone and do not represent those of any employer, government or other party. Any errors and omissions are the responsibility of the authors.

2. State of the Nation

2.1 A Brief History of Asbestos

Asbestos has been used since Roman times as a material with strong insulation properties. The negative health properties associated with asbestos were also noted in these early times.

Asbestos mining continued in Australia up until 1983. Asbestos use in Australia however peaked in the 1970's. Australia over this period had one of the highest per-capita asbestos consumption rates in the world.

Asbestos use peaked in the US during World War II as a result of the enormous shipbuilding programs undertaken. Most other nations used asbestos substantially in the 1960s through to the 1980s. Asbestos was used extensively in the shipping, electricity rail and water industries.

The use of asbestos in manufacturing reduced to relatively negligible levels in the 1980's in Australia, however some manufacturing and some imported products were still used for a number of years as no substitute could be easily found with such excellent heat-resistant properties.

The use of Asbestos in Australia in newly manufactured products has now effectively ceased, however very significant levels of asbestos still remain in the environment in Australia through the use of building products, pipes, insulation and friction products.

The phasing out of asbestos occurred has generally occurred earlier in the US, at a similar pace in the UK and at latter dates in other parts of the world compared to Australia. Asbestos is still significantly used in parts of the developing world.

2.2 Asbestos related diseases

We have made reference throughout the paper to asbestos disease, but it needs to be borne in mind that asbestos disease is a severe form of Dust Disease. There are several asbestos diseases types:

Mesothelioma

Mesothelioma is a highly aggressive cancer that is mostly fatal within two years of diagnosis. Mesothelioma can manifest itself anywhere from 15 to 60 years after exposure to asbestos fibres. Asbestos is the only known risk factor for mesothelioma. The extremely long latency period of this disease means that despite asbestos exposure dramatically reducing over the past 20 years, the number of new cases is presently still increasing.

Asbestosis

Asbestosis is a scarring of the lungs caused by accumulation of asbestos fibres. It is generally related to relatively high exposure and has a much shorter latency period ranging from only a few years to up to 30 years. Asbestosis can vary significantly in severity from mild respiratory problem to fatal condition.

Lung and Other Cancers

Lung cancer may be related to asbestos exposure although lung cancer is also obviously related to smoking. The combination of asbestos exposure and smoking has been found to have a multiplicative effect upon the likelihood of contracting the disease. Lung cancer has a relatively long latency period. Other cancers are likely to be caused by asbestos, although their incidence is significantly lower than mesothelioma and lung cancer.

Asbestos-Related Pleural Disease

Asbestos-Related Pleural ('ARPD') diseases including Pleural Plaques are a series of benign non-fatal lung conditions leading to limited disability. These conditions may however be a pre-cursor to a later, more severe disease. A number of other similar lung-related conditions can be misdiagnosed as ARPD.

2.3 Waves of Exposure

Exposure to asbestos has been expressed as a series of three 'waves'. The first wave of claims relates to exposure occurring from mining of asbestos. Given that the peak of mining exposure is now many decades in the past, the number of deaths from this source of exposure is in decline.

The second wave claims relates to exposure from manufacturers, users and installers of asbestos. The main defendants in Australia for these cases were and continue to be CSR/Seltsam as well as James Hardie Industries (now known as Amaca and Amaba). These companies processed the raw asbestos into a number of different products. Other second wave defendants are the major users of asbestos including companies and government-related organisations associated with railways, shipping and power generation.

The third wave of claims relate to exposure to asbestos that is currently in the environment. This exposure may occur through the maintenance, renovation or removal of structures containing asbestos or from exposure during actual removal of asbestos. The deaths from this asbestos exposure may continue at a low level almost indefinitely as a result of latent environmental asbestos.

2.4 Difficulty of Cost Estimation

It is not the intention of this paper to discuss methods of reserving asbestos or recommend reserving approaches. Nevertheless we should briefly note the significant issue of cost estimation of asbestos liabilities.

Estimation of losses is difficult firstly because of the difficulty in estimating the number of claims. Given the past experience of projections in this area we will not lay claim as to an estimate of the correct peak date for asbestos related claims other than saying that it appears that such a peak does not appear to have yet been gained.

The average cost of claims is also difficult to estimate. It is clear that ongoing and continuous superimposed inflation continues to occur through increased heads of damage and increases in general damages amongst other reasons.

2.5 Defendants

The typical defendants to asbestos related claims are either employers in relation to workers compensation claims, or in respect of non-workers claims, organisations that typically fit within the classes described below.

It is worth noting that if the experience in the USA were to extend to the Australian market, then the number of defendant organisations would increase and the defendant classes broadened. In the USA where a large number of defendant companies have entered bankruptcy proceedings, the claimants have sought compensation from multiple defendants some of which have only a minor causal connection to the claimant's condition.

A good example of the broadening defendant market is the attempts to join tobacco companies. Claims or cross-claims have been filed in the USA alleging that in whole or in part certain injuries were caused by tobacco products rather than being entirely due to asbestos exposure. Efforts in Australia to join tobacco companies have so far been unsuccessful.

Manufacturing Companies

Probably the largest exposure is that faced by the manufacturing companies. This has now been effectively reduced to two companies, CSR and Amaca/Amaba. It should be noted of course that the legal liability for both of these companies does not lie with the holding company, but rather with the former asbestos manufacturing subsidiaries resulting in a number of issues with respect to the James Hardie subsidiaries.

The claims against the manufacturers are generally either workers compensation claims or product liability claims. A significant proportion of the costs faced by the manufacturers would relate to cross-claims or shared claims for either other users of asbestos or their insurers.

Other Companies

Almost any other company could have an asbestos liability because asbestos can conceivably be located in almost any work location. It is obviously the case however that exposure is concentrated in industries such as electricity generation, railways and motor vehicles production and maintenance.

Although much of this exposure is insured, it is sometimes the case that policies have been commuted. It is also the case with some older policy years that policies have relatively low, unindexed policy limits, thereby returning a significant part of the cost back to the insured company.

There is potentially some exposure of tobacco companies to asbestos claims. Other defendants are actively seeking contributions from tobacco companies where a worker exposed to asbestos contracted lung cancer and was also a smoker.

Insurers and Reinsurers

The experience of insurers varies significantly depending on the insured company and whether the exposure is from workers compensation (generally earlier experience) or product liability (generally later experience). Some insurance companies have (in retrospect) made significant savings via commutations at the

expense of the involved, formerly insured, company. Insurers generally have much greater asbestos-related reserves than five years ago.

Governments

Both Federal and State governments face significant and growing liabilities through exposure to various agencies including the maintenance and manning of Royal Australian Navy ships, the use of asbestos in various rail authorities and power utilities to name just some of the more prominent exposures. These exposures are still significant even for agencies where privatisation of assets has occurred as the government has generally retained the past claims exposure.

Environmental

One UK study estimated that ultimate UK exposure would result in mesothelioma cases ultimately dropping to a long-term level of 5% of the peak. The remaining cases would be due to latent environmental asbestos exposure. In Australia asbestos-related disease sufferers with no obvious cause would probably be litigated as product liability claims against the manufacturing companies.

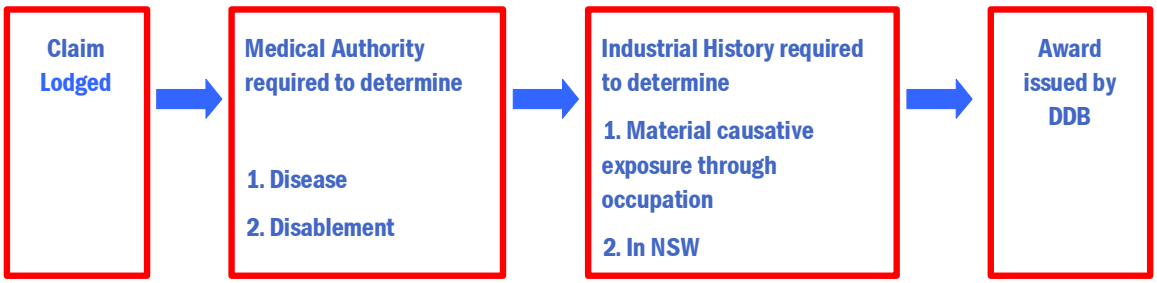
3. Compensatory Mechanisms in Australia and Overseas

3.1 Australian Mechanisms

Dust Diseases Board and Dust Diseases Tribunal

The forum and mechanics for compensation for persons affected by asbestos in Australia is dependant on the nature of the compensation sought, which in turn is dependent on the circumstances of the exposure to asbestos. Generally speaking, claimants who are exposed to asbestos through occupational circumstances may claim against a workers compensation scheme, or alternatively, in circumstances where there are allegations of negligence in tort, a claimant may pursue common law rights.

NSW is the only state to have a specialist Dust Diseases compensation scheme to provide worker entitlements and common law damages to claimants. The Dust Diseases Board ('DDB') is a statutory creation designed to administer the Workers' Compensation (Dust Diseases) Act 1942 – 1967, and as such has exclusive jurisdiction to determine all matters in respect compensation of a worker. Furthermore, in NSW there is the Dust Diseases Tribunal ('DDT'), a specialist court created to deal with claims in tort for negligence relating to death or personal injury resulting from specified dust diseases and other dust-related conditions.



The key objective of the DDB is to deliver compensation with minimal administrative burden. The DDB is required to approve the award after certifying the applicant is a worker. The Medical Authority has the sole responsibility of assessing whether the applicant has a dust disease and assess the degree of disability. There is a prevailing view amongst some stakeholders that the benefits in NSW are more generous, and this has led to a suggestion of forum shopping by workers in States other than NSW bringing claims in the DDB and DDT.

Funding the DDB

Payments made by the DDB are substantial. In the 12-month period to 30 June 2003 the payments made by the DDB were $49.6 million. The funding for the DDB is by a dust disease levy that is payable in addition to the basic workers compensation tariff premium levied against all employers. The tariff is dependant upon industry classification.

Each June, the NSW Government issues the Insurance Premiums Order which contains information on the WorkCover Industry Classification System, premium rates, dust diseases rates and information on the manner in which an employer's claims experience will be incorporated into their premium.

Workers compensation in States other than NSW

Claims by employees affected by Dust Diseases in States other than NSW may be made under the various workers compensation arrangements available to Australian workers. The cover available varies by state and by the period of cover. These benefits are often primarily statutorily determined in states such as South Australia and the Northern Territory.

One issue for workers who were exposed well in the past is the problem of low, unindexed common law limits on contracts from earlier periods. For states such as NSW and Victoria, common law limits only became unlimited in the late 1970's and early 1980's. Limits varied prior to this date but some claims settled have been subject to limits as low as $6,000. Under such circumstances a worker will often attempt to claim under conventional common law.

Common Law Damages

Whereas the DDB provides a "no fault" compensation system to workers in NSW, persons have affected by Asbestos Disease and are able to prove negligence as required by the law of tort and can bring their claim in the DDT.

Outside of NSW, claimants are entitled to pursue their common law rights in a similar manner to the way in which common law rights are pursued for other product losses. Generally, the heads of damages are past and future medical expenses, loss of income and earning capacity, and pain and suffering, but the uniqueness of Dust Diseases means that there are differences in the common law damages awarded for Dust Diseases. The ability of claimants to pursue their common law rights is governed by the State in which the damages are pursued, and as stated, such rights are restricted or do not exist in some states.

The issues surrounding a claimant's entitlement to common law damages are the most controversial aspect of compensation for Dust Diseases. There have been repeated calls by claimants, most recently in the Commission of Inquiry, that claimants should not be inhibited in their pursuit for common law damages. Against this are the suggestions that common law damages are spiralling out of control and that reforms are necessary. These claims need to be considered in the context of the forum, because as will be demonstrated, different entitlements exist in different States.

3.2 Compensation Mechanisms in the USA

Exposure

Asbestos exposure in the US has followed a different pattern to that of Australia. The USA had significantly greater use during World War II in the shipbuilding industry. The USA also generally imposed safety restrictions and reduced the use of asbestos at an earlier date compared to Australia.

Despite the earlier exposure seen in the USA, this has not led to a decline in the level of compensation. The litigiousness of the USA legal system with the combination of joint and several liability, forum shopping and mass torts has led to the situation of peripheral defendants paying claims to peripheral claimants. The legal regime is substantially different to Australia (and the UK) impacting on both claimants and defendant companies faced with asbestos liabilities.

Nowhere is the need for wide ranging change to the asbestos compensation regime felt more acutely than in the USA. The current USA regime is heavily criticised, and the criticism are generally unique to the USA because of its judicial processes.

- The USA system is very expensive. It is estimated that in the 1990's only 43% of asbestos payments went to victims and 57% to lawyers.
- The USA judicial system more readily permits class actions. This allows plaintiff lawyers to 'package' the settlement of their most serious cases with less serious cases (including cases where the claimant has no injury). The result is that plaintiffs with severe illnesses receive less than if their case were to be heard separately. Class actions are also prejudicial to claimants who, at the time they agree to participate in the settlement have not presented with an illness. Subsequently, these claimants are not able to receive further compensation should an actual condition occur or an existing condition worsen because the initial settlement often requires release of the target defendant.
- The current USA system precipitates bankruptcies of the defendant companies that can result in victims having no compensation recourse.

The FAIR Act

There are wide ranging changes likely to be implemented in the USA for asbestos compensation with the implementation of The Fairness in Asbestos Injury Resolution Act ('FAIR Act'). The legislation was passed by the USA Senate Judiciary Committee in July 2003 but has not yet been enacted primarily due to implementation and operational issues.

Extensive negotiations between the Federal Government representatives resulted in a revised Bill being introduced in April 2004, but due to the USA Federal elections, the FAIR Act has slipped from the political agenda at least until early 2005.

The FAIR Act aims to establish a national trust fund which is privately financed by asbestos defendant companies and insurers - there is no taxpayer money involved. The Act establishes 10 levels of compensation, ranging from free medical monitoring to compensation up to $1 million (for those people with mesothelioma), although the levels of compensation are not agreed and remains a controversial issue.

3.3 Other Nations

Compensation Mechanism in the UK

Recent studies in the UK suggest that the total cost of asbestos liabilities could be as high as £20 billion. The total claim numbers are expected to be between 80,000 and 200,000 with reported claims peaking in 15 years time. Asbestos-related deaths are currently more than 3,000 people per year compared to Australian deaths of less than 1,000 per year.

Compensation mechanisms are similar to Australia whereby claimants under the UK system have the option of pursuing statutory benefits under the workers compensation legislation or pursuing common law damages. Workers compensation benefits are available to persons who have contracted an asbestos disease through the course of their employment, and such benefits can take the form of either weekly benefits or a lump sum payment.

Typically workers compensation benefits are available through Department of Social Security (DSS) benefits (administered by the Benefits Agency), which is a government-run "no fault" compensation scheme that pays a weekly pension. In circumstances where the former employers or their insurers are bankrupt or cannot be traced workers are able to pursue benefits through The Pneumoconiosis etc (Workers' Compensation) Act 1979, often known as "the 1979" Act.

A differentiating factor between the UK and Australian system is the establishment of a Policyholders fund to meet the shortfall created by the event of insolvency of an insurance company. The Policyholders Protection Act provides that the Policyholders Protection Board will fund between 90% and 100% of the shortfall created by an insolvent insurance company. Importantly, the Policyholders Protection Act also protects the interests of individual policyholders on compulsory insurance cover, such as employers liability insurance. Funding is provided through a levy on all insurance policies.

This is significant because in the UK, it is estimated that the insurance industry will meet approximately 50% of the asbestos cost, and through the establishment of the Policyholders Protection Board, the insurance industry obligation to meet its share of the cost is satisfactorily guaranteed.

There remains some uncertainty regarding entitlements for certain employees with claims attaching to policies written prior to 1972, this being the date that the Policyholder Protection Act took effect. This issue arose in the case of the recent insolvency of Chester Street Insurance Holdings Ltd (a direct writer with large asbestos liabilities) in the UK. The matter was resolved through a stakeholder consultative process where it was agreed that if a compensation award was settled before Chester Street's insolvency on January 9, 2001, the Policyholder's Protection Board would pay 90% of awards in respect of pre-1972 liabilities and 100% of awards where exposure occurred after 1972. If the compensation award was settled on or after January 9, the insurance industry will fund equivalent payments pending the implementation of the new industry-funded Financial Services Compensation Scheme (FSCS).

Europe

Asbestos exposure in Europe is generally thought to be later in time than in the US, UK and Australia. Compensation of asbestos related injuries in Europe varies from one country to the next. In general European countries have both stronger national governments and a more significant social insurance tradition.

The greater social insurance tradition is reflected in the fact that the majority of medical and welfare costs have been traditionally paid by the state in much of Europe. Claims are not therefore paid for minor injuries or exposure only.

Common law is generally much less significant compared with Anglo Saxon countries, although this is gradually changing. Germany is very strict with virtually all claims resolved by the State and no common law redress whereas France recognises common law rights.

Remaining Nations

Currently (in 2004) asbestos is still mined in Russia, China, Zimbabwe, and Kazakhstan. Asbestos is also in fact still mined in Canada however only one mine now remains open.

Whilst asbestos use in new products has effectively ceased in the First World, there is still significantly asbestos exposure in the Third World. This greater

exposure is a result of asbestos still being used in production as well as due to significantly lower standards of occupational health and safety protection.

Compensation systems naturally vary greatly, but are normally much less generous (if they even exist) in many nations. It may well be that these nations will see significant liabilities emerge in the next few decades.

3.4 Insolvency Procedures in Australia and Overseas

The comments above illustrate that different nations sit in the spectrum between a common law system of compensation and an administrative scheme. In jurisdictions where the compensatory mechanism relies on a court based systems, and in circumstances where the defendants are not able to meet their liabilities, then relief that claimants are able to obtain is heavily dependant of the insolvency regime of the particular jurisdiction. As can be seen, the insolvency regimes are not satisfactory for the claimants, although it might be argued that the US regime is more favourable to the insolvent defendant companies.

The Australian Insolvency Regime

Insolvency procedures in Australia are governed by the Corporations Act (2001). There are essentially three forms of insolvency procedure available to a corporation that is unable to meet is liabilities under the Corporations Act, none of which adequately deals with the situation of a corporation that is presently asset positive but is unlikely to be able to meet its future asbestos liabilities. These procedures are:

- the appointment of an administrator pursuant to s436A(1) of the Corporations Act;
- an application to the court for a winding-up order pursuant to s461(1)(a) of the Corporations Act following a special resolution by the company that it be wound up by the court;
- a Scheme of Arrangement under Part 5.1 of the Corporations Act.

Appointment of an Administrator

In the case of the first option, a difficulty arises where the appointed administrator is required to consider the interests of the companies' creditors, including its contingent creditors whose claims are not yet known to the company. It is difficult to do so because the interests of current creditors would be in conflict with the contingent creditors, and yet, an Administrator is required to act in the interest of both groups of creditors without favour.

A Court Winding-Up

There are a number of difficulties with a winding-up order. Upon Liquidation a Liquidator would be required to identify creditors, and the definition under the Corporations Act is only debts payable by the company, being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company. Case Law has defined the meaning and application of relevant date that may exclude all creditors whose injury (being diagnosis of an asbestos disease) reported after the winding up date. These creditors would be excluded from the Liquidation.

A Scheme of Arrangement

Similar difficulties as those described above exist in relation to a Scheme of Arrangement. In order to implement a Scheme it would be essential for the Scheme Administration to estimate the future liabilities, for the purpose of estimating a dividend payout. This may be achieved, however difficulties with the identification of future creditors would mean that the required voting majority would not likely be met.

The USA Insolvency Regime

At present over 70 US companies have filed for bankruptcy primarily as a result of asbestos-related claim costs. Bankruptcy is now a common tool for claims management of distressed companies in the USA. As individual companies have declared bankruptcy, claimants have shifted to other more solvent defendants including insurance companies and secondary users of asbestos products.

Chapter 11

Of the 70 US companies that have claimed for bankruptcy almost half have filed for restructuring under the US bankruptcy laws, particularly Chapter 11 procedures. Recent estimates in the USA suggest that as many as 8,400 companies are currently defendants in asbestos cases, and combine this statistic with the fact that recent studies show that companies filing in the USA for Bankruptcy protection remain profitable, the use of bankruptcy procedures will continue to be extensively utilised.

Chapter 11 bankruptcy offers a significantly different route compared to companies in Australia. Under Chapter 11 a company retains existing management and is able to declare a moratorium on debt repayments whilst debts are restructured. A company filing for Chapter 11 filer usually proposes a plan of reorganisation to keep its business going and to pay creditors over time.

The introduction of Chapter 11 style procedures in Australia has been touted, but has received a negative response from banks and lending institutions. The main criticism is that it significantly reduces the powers of creditors in favour of debtor companies.

The UK Insolvency Regime

The insolvency regime is very similar to the regime in Australia, whereby the options available to a company faced with insolvency are similar to those available in Australia. In fact, the similarities between the Australian and UK insolvency regimes lead to the same problems discussed above in the context of the Australian insolvency processes.

It is worth noting however that the use of Scheme of Arrangements for companies with long tail liabilities (particularly insurance companies) is quite prevalent in the UK.

4. Issues of Compensatory Structure

A number of questions or considerations should be taken into account when determining a compensation structure. The issues set out below are not all specific to asbestos compensation.

4.1 Scope of Coverage

Scope of coverage is an issue that deals with the types of asbestos conditions that should be covered by any compensatory scheme. In one sense defining asbestos-related diseases that should be covered by any compensatory scheme should be more straightforward than for many other types of compensation in that the more severe asbestos-related conditions are normally solely due to asbestos exposure.

As the US experience shows however the definition of a valid claim can be significantly extended. As a result of class action practice and a relatively pro-claimant court system the situation has arisen whereby people with no actual physical disability are able to claim for compensation. It is not uncommon in the US for workers to be offered a free chest x-ray and with the support of non-specific irregularities identified in the x-ray, claimants have been able to secure payments of up to $20,000, despite the fact that they lead normal and healthy lives.

In Australia the scope of coverage has been less expansive although a recent court decision that awarded damages to a claimant with an alleged psychiatric condition related to asbestos exposure attracted some controversy.

The main boundary issue in Australia has probably been more in the manner in which lung cancer claims by smokers who have been exposed to asbestos have been treated. In some cases such cases have been rebuffed, whilst in others significant compensation has been awarded.

Scope is also an issue with respect to what types of injuries should be covered. The Dust Diseases board in NSW for example does not cover claims resulting from environmental exposure.

Scope is finally an issue with respect to jurisdiction. Jurisdictional issues include questions such as:

- Which states are covered by a particular compensation scheme?
- How are claimants who are now resident in other countries to be treated?
- In which jurisdictions are claims to be heard?

4.2 Method of Assessment

Currently in Australia the assessment of the injury and amount of common law compensation is determined in an adversarial manner. Assessment of severity for claims made via the DDB is administratively determined. Alternative methods of assessment can use the services of independent medical personnel or panels that are acceptable to both parties. Ideally the assessment process should include relatively prescriptive guidelines to minimise disputes and uncertainties.

Even when an independent arbiter is used, there will still need to be some process to resolve disputes between parties.

4.3 Benefit Structure

Benefit structures generally fall into two types of categories, those that are based more on a table-of-maims type approach and those that are based on a common law type approach. Some structures offer a combination of these two approaches or may request an election to be made between the two benefit types.

Common law benefits in theory allow better consideration to be made of individual circumstances. The vagarities of court processes however often lead to highly variable results.

Table-of-maim prescribed approaches are more inflexible however they offer greater certainty and if well constructed are less vulnerable to superimposed inflation.

4.4 Funding issues

The issue of funding for any proposed 'solution' to asbestos payments raises a number of questions including:

- Should funding be open or closed, ie will the funding parties be asked for additional contributions/calls or not.
- Should funding be made as a lump sum or annuity? A lump sum has the advantages that it may offer certainty for a contributor and for the fund. A lump sum also obviates the effects of possible future financial difficulty preventing payment. An annuity however offers less immediate strain on the contributor and also may be more easily adjusted should funds prove excessive or inadequate.
- The identification and determination of contribution levels by different parties is obviously a very important and challenging task. Any estimate of contribution may have to take into account past exposure, past experience, insurance and reinsurance levels, as well as current ability to pay. The lack of good exposure data for many defendants makes the task particularly difficult.
- Prior to commencement a decision should be made as to what should be done with any surpluses or deficiencies.
- A final important issue is the degree to which any fund should be government guaranteed. The extent to which this is likely will obviously depend upon the type of scheme. To some extent an ultimate government guarantee is not as unreasonable as it might seen as government is effectively the insurer of last resort of any scheme.

4.5 Governance

A government agency, an independent body or a branch of the judiciary could conduct governance of such a scheme.

Defendant Participation

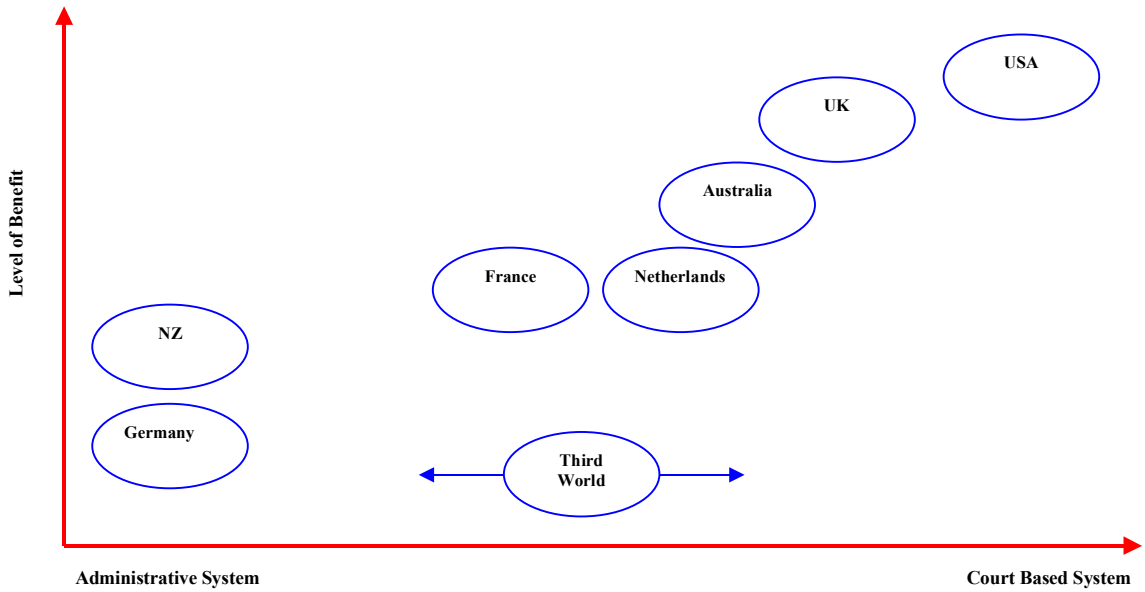
There are several options as to how defendants could participate in a compensation Scheme. One option is to start small with a select number of defendants included. The scheme could then grow over time to include additional defendants as appropriate. Another approach is to have a big-bang type start whereby all defendants decide to participate at a particular date.

Any participation decisions also need to consider under what circumstances a defendant may be able to opt out.

4.6 Overseas Structures

Options

Set out below is a simplified diagram detailing the position of different jurisdictions comparing the broad level of Benefit to the extent to which they are more administrative or more common law based:



The horizontal axis shows the Administrative versus Court based position whilst the vertical axis shows the broad level of Benefit payable to sufferers.

Administrative in the diagram refers to a system that has more of the following characteristics:

- Table of mains
- Medical assessment
- No Fault
- Limited or no pain and suffering damages.

Whereas Court Based System refers to a system that is more:

- Court settled
- Adversarial
- Individual Characteristics
- Fault based
- Pain and suffering damages

It is interesting to note that there is a clear positive correlation between the type of system and the level of benefits. It would be easy to conclude that common law equals high cost, however the reality is somewhat more complex. Whilst the common law approach does appear to have higher delivery costs, much of the differences in total cost are explained by other factors.

The approach taken towards compensation depends significantly upon a country's history, national character and legal traditions. Different countries attach greater or lesser importance to individual versus state rights. Different countries also have different traditions as to the level of social support given to individuals.

For example the low level of benefits in Germany reflects a relatively generous social security system and a more socialised attitude towards compensation. The highly litigious US environment is to some extent a reflection of the individualistic nature of US society. Australia's national character and approach is somewhere in-between.

It is also of interest to note the currently poor level of benefits in the third world. Given the rapid development of some of these countries and the much lower safety standards, one wonders whether these countries will have their own 'asbestos crisis' in decades to come.

Consideration of changes and comparison of systems therefore needs to take into account the other compensatory and social structures of the jurisdiction.

4.7 *Conclusions regarding approach*

The approach taken to compensation depends significantly upon a country's history, national character and legal tradition. Different countries attach greater or less importance to individual versus state rights. Different countries also have different traditions as to the level of social support given to individuals.

Asbestos related diseases are somewhat unique in that evidence for causation is relatively strong as the diseases involved are mostly caused by asbestos (although finding the party at fault for the actual exposure can be difficult due to the long latency period.

This causation is weakened however by the extremely long latency period. This provides some justification for a more socialised approach. It could be argued that penalising current shareholders of insurers, producers and users of asbestos is inequitable given that the events were so far in the past. The alternate argument is that common law penalties should serve as a warning for future laxness.

The problem from an insurance perspective is that the quantum of latent injury is difficult to assess. The difficulty in assessment means that any company assessing a future risk runs the risk of either over-estimating and therefore charging excessive premiums, or under-estimating and therefore potentially under-paying due to funding inadequacy.

Asbestos related injuries have of course no right method of compensation. Legal rights need to be balanced versus efficiency in delivery and equity of compensation. The decision is a philosophical one and is based upon whether a social justice or social security approach is thought pre-eminent.

5. Barriers to change

5.1 Stakeholder Preferences

The key to the implementation of change to the compensation for asbestos disease requires in the first instance a desire amongst the stakeholders to introduce change. As can be seen from the more detailed discussion at Section 7 herein, the respective position of claimants and defendants, and groups aligned as such, is diametrically opposed. If the key stakeholders were to adopt intransient positions, then it will be near impossible to introduce change to the compensation for asbestos.

5.2 State Law Inconsistency

The governing legislation for asbestos claims is predominately the relevant State legislation. As previously stated, workers compensation claims and claims for common law damages must be brought under the relevant State Workers Compensation Act or as a common law action seeking common law damages. Exceptions apply to NSW where there exists a specialist Dust Diseases Board and Tribunal.

There exists however vagaries across the different States. The vagaries in the Workers Compensation awards are a product of the different prescribed legislation, however, the differences in the common law damages awarded arise from less explicit factors.

Tort Reform

Substantive change in tort law has been experienced in most Australian States and Territories. In addition, there have been attempts by the Commonwealth to introduce complimentary reform in an attempt to facilitate and support the State reforms.

NSW enacted the Civil Liability Act in June 2002, which amongst other things provides upper limits for non-economic loss ($350,000) and lost future earnings (three times New South Wales' average weekly earnings), applies a threshold of 15 per cent impairment in respect of general damage and prescribes interest calculations and discount rates for damages awards. Similar legislation has been enacted in other States. However, Dust Diseases are specifically excluded from the tort reform in all States.

In the absence of such reforms for Dust Diseases it is likely that superinflationary cost increases are likely to continue. Superinflation of costs is a key driver of the increased asbestos claim costs. The absence of such reforms contributes significantly to the level of uncertainty. The ultimate costs are heavily influenced by factors such as court interpretations, legislative changes and socio/economic conditions, all of which would be impacted in some way by the tort reforms if they were to apply to Dust Disease claims.

Forum Shopping

The difference in State laws has led to forum shopping, although the extent of forum shopping is the subject of contention. The most prevalent allegation of forum shopping relates to claimants who bring their claims in the NSW DDB or DDT but do not have the appropriate causal connection with the state of NSW. This has led to proposals to limit interstate workers making compensation claims

in the DDT. Proposals include damage caps and restrictions to the tribunal's jurisdiction. It is estimated that of the 500 claims in the DDB in 2003, possibly 150 were from claimants that resided interstate.

The recent case of BHP Billiton V Schultz is a case recently heard by the High Court of Australia on the issue forum shopping. Judgement in this matter is currently reserved. In this case Mr Schultz lived in South Australia and in August 2002 commenced proceedings in the Dust Diseases Tribunal of New South Wales ("DDT") against BHP in negligence, contract and for breach of its statutory duties. BHP sought an order in the Supreme Court of New South Wales pursuant to the Jurisdiction of Courts (Cross Vesting) Act 1987 (NSW) ("CVA") that the pending DDT proceedings be removed into the Supreme Court and transferred into the Supreme Court of South Australia. The application was refused at first instance for, amongst other things, the personal circumstances of Mr Schultz. On appeal, consideration has been given to whether the DDT had any speciality in dealing with similar claims.

The Schultz case is also interesting because on appeal the Court considered whether the New South Wales Dust Diseases Tribunal could hear the matter sitting in South Australia. This in turn raises questions about the legislative power of a State and if a State can authorise a Court of its creation to conduct proceedings in another State. It also underlines the perception that there are greater benefits awarded by the DDT, but also may be indicative of the DDT specialisation and function in States other than NSW.

5.3 Inconsistency in the law of negligence

Not only is there inconsistency in the different State's approach to asbestos compensation, but also there is a basic inconsistency between the States in the interpretation in the tort of negligence. Where tort reform has been enacted, calls have been made to introduce consistency in the reform across the States. As stated, tort reform has specifically excluded Dust Diseases.

There is a strong argument that there should be no difference between the substantive law of negligence applicable to Dust Disease claims applicable to any other type of claim for personal injury. There is a need for uniformity and common acceptance of how to the law of negligence should apply to Dust Diseases in areas such as:

Causation

Arguments arise on the extent to which scientific evidence should be accepted, especially in novel cases, which arise in Dust Disease cases. For example, there is conflicting scientific evidence on so-called "low dose" cases.

The issue of causation arose in the recent case of Arturo Della Maddalena. In this case the Western Australian courts awarded the claimant damages on the basis of a diagnosed psychiatric condition related to his fear of dying from a disease related to his work. Claimant groups argue that the case has not set a new standard as the facts of the claim were quite specific and would not broadly apply, whereas defendant groups would argue that the case has set a precedent which significantly increases the number of potential new claimants.

General Damages

One area of concern in the award of general damages is the proposition that the courts are prohibited from comparing awards of different cases for assessment of general damages.

Damages with respect to Gratuitous Care

The High Court held in 1977 in the matter of Griffiths V Kerkemeyer that damages may be awarded in respect of services provided to a claimant gratuitously by a family member. Since this decision the principles have been expanded and consequently attempts have been made to limit such awards, leaving an inconsistent and uncertain position.

Exemplary Damages

The availability of exemplary damages for Dust Disease cases is not clear and is probably inconsistent across different states.

Joint and Several Liability

Generally, Mesothelioma is considered an indivisible disease meaning that any tortfeasor whose negligence made a material contribution to the damage to the claimant is liable for the whole of the plaintiff's damage. Other Dust Diseases such as asbestosis and pleural plaques are considered divisible meaning that any tortfeasor is liable only for that portion of the damage caused. These principles are akin to the common law concepts of joint and several liability.

The divisible disease cases have led to a situation of proportionate liability and this has provided incentives to claimants to join all relevant tortfeasors. This creates a situation of spreading the asbestos loss, and this is a concept to be considered when determining contributions to a revised compensation mechanism.

5.4 Contribution Estimation and Agreement

Contribution Issues between Defendants

Contribution to the funding for asbestos claimants is the cornerstone of an alternative compensation mechanism. The determination of contributions is of course one of the more difficult parts of any scheme determination. It is not the intention of this paper to comprehensively list the approaches available, however some of the key issues include:

- Should contribution be determined individually and then summed (bottom-up) or be made on a population basis and then divided up (top-down) or a combination of both approaches?
- What formulae should be used to determine the relationship between exposure and disease likelihood/severity?
- How should allocation be made between employers with shared negligence on an individual claim?
- How should reinsurance and policy limits be applied when determining liability?
- How should contributions be determined for companies that are in a weak financial state and who should pay for any under-contributions as a result of such?

- Should contributions be one-off or annual and what should be done about any excessive or inadequate funding?

The calculation will obviously be quite complex, as well as the need to negotiate with the various parties to take into account their individual circumstances. Of importance to a number of parties will be the degree of certainty attached to any funding. Cost control and 'reform' of compensation determination will be important concerns for contributors.

Contribution Issues between Insurers

It is the obligation of Insurers to provide indemnity to their insureds for insured events or circumstances. Leaving aside insurer's liability for Dust Diseases arising from an insured's occupational hazards, an insurers liability for common law damages will generally arise from liability cover. Difficulties arise in determining an insurers contribution obligation primarily because of the different trigger theories.

It is most prevalent to apportion liability to insurance coverage adopting a "continuous trigger" theory. This theory supposes that the injury occurs on the initial exposure through to the time when damage became manifest. In practice this means that there is a pro rata allocation between insurers on risk during the relevant period. Other relevant theories include:

- The "Exposure" theory, where the insurer on risk when the insured was first exposed is required to respond.

- The "Manifestation" theory, where the policy in place when the claimant becomes aware of the damage must respond.

- The "Injury in Fact" theory, where the policy on risk when the damage actually occurred is the policy that respond.

The issue of insurer contribution becomes complicated where for example a defendant company has a complex insurance program comprising of a number of excess of loss policies over multiple years with different insurers subscribing to different insurance coverage terms. This becomes more complicated where some of the policies are "claims made" and other policies are "occurrence" policies. It can be even further complicated in circumstances of insolvency of an insurer if a claimant can maintain a "cut through" claim to the insurers reinsurance under section 562A Corporations Act.

Funding the FAIR Act

It was worth looking at how it is intended that the FAIR Act in the USA will be funded and consider its applicability for the Australian market. The FAIR Act funding will be achieved through four layers of funding that break down as follows:

(i) the first layer is mandatory contributions from defendants and insurers spread over 27 years;

(ii) the second layer provides the Scheme's Administrator with access to supplemental accounts and borrowing authority;

(iii) the third layer is a contingent call funding vehicle; and

(iv) and the forth layer is a back-end funding vehicle.

The primary source of funding comes from mandatory annual contributions by defendant participants and insurers during the first 27 years of the Fund's life. This is further broken down with 50% each to be provided by defendants and insurers that have been exposed to asbestos claims in the tort system. Although insurers and defendants share this funding obligation equally, the mechanics of how these amounts will be assessed towards each contributing group necessarily differs.

For defendants, the Administrator will assign companies into tiers that are defined by prior company expenditures incurred defending asbestos claims in the tort system and then into sub-tiers based on revenue levels, calculated by each company's reported earnings for the most recent fiscal year ending before December 31, 2002. The basis for this system is the belief that a dual tiering system that accounts for past asbestos expenditures and company revenues is a fair measure of a company's ability to fund the assessments.

The FAIR Act takes a different approach with respect to the asbestos insurers. Rather than establish an allocation formula, the FAIR Act creates a separate Asbestos Insurers Commission, which holds responsibility to determine the amount that each insurer is obligated to pay into the Fund. The belief is that it is necessary to delegate the task to a separately commissioned entity with the necessary technical expertise that is required in developing a fair and appropriate allocation formula.

The Administrators have further recourse to supplemental accounts, borrowing authorities available and contingent call funding. Such recourse is available through a mandatory surcharge on defendant and insurer contributions, access to orphan share accounts and the ability of the Administrator to borrow from commercial lending institutions amounts to offset short term losses up to a level that does not exceed anticipated contributions for the following year. A contingent call funding vehicle gives the Administrator the discretion to withhold step-downs in contributions.

As currently structured, the Fund envisions a payment schedule that begins with at least $5 billion annually during years one through five with a gradual reduction in the amount of such payment beginning year six, but if the Administrator certifies that the Fund is encountering financial difficulties in paying claims, the Administrator is authorized to assess participants at the one-to-five year contribution levels.

Finally the back-end funding vehicle gives participants the option to either continue contributing into the Fund in an aggregate amount not to exceed USD 2bn annually or have the remaining claims resolved in the tort system in Federal Court.

6. Possible Solutions

Consideration of the possible solutions must start with the basic question, and that is whether there is a desire for an administrative system or whether the court based system should be retained. Somewhere in between there is a hybrid approach that assumes that the compensation mechanism is underpinned by an administrative system but incorporates elements of the court-based system.

If the answer to the question posed above is that it is desirable to maintain a court based approach to compensation for asbestos, then relatively minimal changes are necessary to the current system, most notably to improve efficiencies and introduce consistency between the States. If the desire is to move to an administrative approach then significant changes are necessary.

6.1 Objectives

There are three broad objectives that should be addressed in the asbestos solution; appropriate compensation for victims, administrative ease for claimants, and equity for stakeholders.

Appropriate Compensation for Victims

The key feature underpinning an alternative compensation regime for asbestos victims is that claimants receive the appropriate level of compensation. Few stakeholders would argue that this is the basic premise upon which an alternative regime must be founded, although there will be arguments primarily around the level of compensation and funding.

Administrative Ease for Claimants

Again, few stakeholders would argue that (genuine) victims of asbestos disease deserve compensation in an efficient and timely manner. The need for administrative efficiency is acute for victims of mesothelioma which life expectancy beyond first symptoms is particularly short. Administrative efficiency is essential not just for victims but also for defendants, and for all stakeholders generally.

Equity for all Stakeholders

There is an argument that the current common law system has the potential to create inequitable outcomes for certain stakeholders, and these inequities will increase over time as more claims emerge from people exposed outside the workplace. In the absence of a fair compensation system it can be envisaged that some defendants will become insolvent and will not be able to fully compensate claimants which would leave an unfair situation for claimants which the Government would have difficulty ignoring.

If these inequities emerge, then there will be different classes of asbestos victims; those that are fully compensated and those that will only be partially compensated or uncompensated.

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6.2 Court Based Common Law

A Court Based system exists in most Australian States that allows claimants to pursue their common law rights.

Advantages

It is argued by claimants and representative groups that the court based common law system represents the best option for claimants because it provides for individual assessment and that in turn enables victims to receive commensurate compensation. Furthermore, it is argued that this court based system is responsive to a changing environment where it is possible that unanticipated heads of damage may arise, and an administrative system of compensation may not provide for such damages.

Disadvantages

The Commission of Inquiry has provided the forum for (predominantly) the defendant groups to articulate their dissatisfaction with the current common law system. The primary argument is that the current system is expensive primarily due to frictional costs associated with legal costs.

It has also been argued that it produces inconsistent results because of the differing State laws and encourages forum shopping. Not only is it argued that the defendant groups are disadvantaged by the current system, it is argued that the claimants are also disadvantaged. This is due to the fact that there are inefficiencies in the current system such that compensation is not efficiently delivered to the claimants. Further, it is argued that the current system is unsustainable, and this will lead to further insolvencies that will in turn disadvantage claimants.

If there was a desire to maintain the common law system, and in view of the disadvantages stated above and the inequities that might arise, it would appear desirable for there to be some reforms to the common law system to address the disadvantages and inequities. Such reforms may include:

- The introduction of Chapter 11 style proceedings.
- Reforms to the Corporations Act on matters of limited liability, such as the ability to lift the corporate veil to allow claimants to access further capital where the defendant company is an undercapitalised subsidiary company.
- Reform of the Corporation Act to allow claims to have direct access to defendant companies' insurance coverage.
- Modification or at least consistency between the States on Statute of Limitation
- Legislative enactment to support corporate Schemes (see below)

6.3 Schemes

There are probably two types of "Schemes" worth considering. The first is one that addresses corporations individually, and one that addresses the market as a whole. We have addressed the second type in Section 6.5 as Administrative Schemes. The concept of enacting legislation to facilitate the implementation of a Scheme is predicated on the basis that that there is retention of (a degree of) the

court based systems, and therefore a need to administer companies that are distressed by its asbestos liabilities.

Advantages

As discussed in section 3.4, there is available to an Australian company that is unable to meet its liabilities, such as an asbestos defendant or even an insurance company, the possibility of implementing a Scheme of Arrangement. The difficulties faced by such a company have been discussed earlier, which essentially amount to difficulties identifying claimants not yet known.

To overcome this difficulty it was proposed in submissions to the Commission of Inquiry that with the enactment of special legislation, it could be possible to implement a form of hybrid scheme of arrangement. The theory being that a Scheme of Arrangement would be voted for every 18 months (or as determined), and this rolling method would have the effect of picking up all new affected claimants who were previous unknown potential future creditors.

The Commission of Inquiry brought into focus the legal obstacles faced by a distressed corporate entity (Amaca and Amaba) and the inadequacies of the Corporations Law to provide a catered solution in the circumstances. The principle behind the special legislation supporting a hybrid from of Scheme of Arrangement do not apply exclusively to a distressed company but could equally apply to a well capitalised company.

Disadvantages

The problem with this concept however is that it doesn't solve the market problem. Ignoring for a moment that the crucial issue of the Scheme terms, and whether the terms would adequately satisfy the objectives, the problem with a Scheme for corporates is that it provides a piecemeal approach a market problem, and it is possible to this approach could exacerbate the difficulties for claimants in a market where there existed multiple Schemes of Arrangements with different terms.

6.4 Hybrid Approach

A hybrid assumes that the compensation mechanism is underpinned by an administrative system but incorporates elements of the court-based system or leaves open to claimants to pursue the common law rights outside of the administrative scheme. Ways in which such schemes may vary from an administrative scheme include:

Claimant opt in or opt out

It is argued by claimants and claimant representative groups that an Administrative Scheme, by denying access to the common law system, is inequitable to claimants because it inhibits natural justice. Underpinning this argument is the premise that each claimant has unique circumstances that cannot be addressed by an administrative scheme, and accordingly, claimants should be given the option of opting out of an administrative scheme.

Defendant opt in or opt out

Difficulties clearly arise where defendants are provided with the opportunity of electing to opt out of an administrative Scheme. Practical difficulties arise where a

claimant has an action against multiple defendants, one of which is bound to the administrative scheme and the other is not. Difficulties may still arise where all defendant companies are bound to the administrative scheme.

If the FAIR Act is to be held out as an example, there is a clear methodology to be adopted for determining the defendant contribution. There is no opt out option available to defendants. Given that defendant contributions are based on historical financial performance, there exists the possibility that circumstance may change such that a defendant company may not be able to meet its determined contribution.

Scope of Hybrid Scheme

A hybrid form of administrative scheme may include a limited scope of coverage. For example, it may be possible to implement a Scheme that only provides compensation for mesothelioma and compensation for all other forms of asbestos disease are pursued through the court system.

6.5 Administrative System

Type of System

An Administrative Scheme is effectively a government-mandated monopoly that provides compensation to injured parties. Australia does not have such an example for asbestos compensation. Examples of such schemes would include the payment of asbestos-related claims in countries such as Germany where common rights are not observed in the same way as Anglo Saxon countries and claims are paid as part of the social security net.

The Australian state and federal monopoly or managed fund workers compensation schemes are examples (to some extent) of such a scheme. Common law is however used in these schemes with the extent varying by state.

An administrative scheme varies from a hybrid in that the solution is generally government sponsored or mandated and there is no opt-in or opt-out provisions. A scheme also tends to have little common law involvement, but there is no bar to an Administrative Scheme providing for common law damages.

Advantages

Administrative Schemes have the advantage that they can significantly reduce the adversarial environment by the use of independent medical assessment procedures. The application of standard benefits also eliminates much disputation around suitable compensation levels. The reduction in the adversarial climate is of considerable benefit for claimants who are already suffering (and in some cases dying) from asbestos-related conditions.

Schemes are also likely to have less frictional cost as legal representation is significantly reduced overall. Schemes also have the advantage that they offer more certainty of cost for both contributors and beneficiaries and a lower likelihood of cost escalation.

Disadvantages

The disadvantages of such an approach is that such a scheme may offer less flexibility with respect to a claimant's circumstances and the nature by which the

disease has been contracted. Such a system may also not react appropriately when a new source of liability or disease is identified.

It can also be argued that the use of an administrative system reduces incentives for risk control. The lack of any 'penalty' for an employer acting irresponsibly with respect to risk control is often cited as an as argument against adopting and administrative scheme.

6.6 Improved Social Awareness

There is little doubt that the recent Commission of Inquiry has brought acute awareness to the problems faced by persons affected by Dust Diseases. The majority of the attention has been focused on the legal rights and obligations of various stakeholders and the search for an alternative compensation mechanism. This in turn has lead to an improved social awareness of the problems presented by asbestos, and how improvements can be made in the area of prevention.

Licensing of Persons involved in Asbestos Removal

There exists a licensing regime controlled by the relevant State workers compensation authority for persons involved in the removal (usually during renovation works) of asbestos products. Differences exist between the workers compensation regimes, but generally an asbestos removal licence is issued to an individual person and not to a company. This means that any work that is undertaken under the ambit of the licence will be the sole responsibility of the licence holder. Licenses are granted following an application process that has a reasonably rigorous review process.

Greater Involvement of Local Government Authorities

Tension has recently grown between workers compensation authorities and local government councils over the introduction of strict rules to govern the demolition and renovation of houses that contain asbestos. The policing of asbestos removal is generally the mandate of the workers compensation authorities, but this generally only extends to occupational regulation, and the therefore does not completely protect the home renovator market. Some councils have recently undertaken initiatives with a view to requiring homeowners to obtain an asbestos clearance before any development application is approved

Another initiative is the creation of a register of homes that contain asbestos. These are intended to be introduced in combination with "pink slips" which detail the level of asbestos and would form part of the conveyance process.

Greater Medical Research

Much of the recent focus has been on improving compensation mechanisms, but there remains significant value in medical research into prevention and treatment. Mesothelioma is a very aggressive tumour and the average survival from diagnosis is about 9-12 months.

There are standard treatment strategies for cancer – surgery, radiation therapy, or chemotherapy – but unfortunately none are effective in cases of mesothelioma. Chemotherapy protocols using several drugs have shown to be capable of killing mesothelioma cells in the test tube.

As well there have been a number of experimental immunotherapy treatments for mesothelioma with some success. In 10-20% of patients there is major shrinkage

of tumour and a small proportion of these patients have lived for over 5 years. It is extremely important for medical research to continue, and this is costly, so the compensation mechanism must not only deliver compensation for persons affected by Dust Diseases, it must also meet medical treatment costs and research.

7. Stakeholder Impacts

When considering what approach would ideally be adopted we need to consider Stakeholders and their likely views about the various approaches. Determining who are genuine stakeholders is not as clear. One could argue that the only true stakeholders are the parties directly affected ie the sufferers and the parties whom are paying compensation, but in searching for a sustainable and equitable solution, the net should be cast wide.

7.1 Stakeholder Objectives

Claimants and Support Groups

There are two primary issues for Claimants. The first issue is that claimants would want to ensure that their compensation entitlements are not diminished under an alternative compensation mechanism, or at a minimum, not less than their current entitlements under the common law system. The second issue for claimants is to ensure that there is administrative ease in the compensation mechanism.

Trade Unions

The mandate of trade unions is to promote the interests of workers. The trade unions have been particularly visible in the Commission of Inquiry and have voiced criticism towards a Scheme because they argue it would reduce compensation payments.

However, it is important to view the comments of the unions in the context of the Commission of Inquiry, and these comments do not necessarily represent the views of the trade unions towards a broad scheme for compensation for Dust Diseases.

Plaintiff Lawyers

It does not necessarily follow that the interests of the plaintiff lawyers is aligned with the claimants and the support groups. The plaintiff lawyers have argued against an Administrative Scheme on the basis that it would deny the claimants natural justice. One clear outcome of a Scheme is that the shift to a non-adversarial forum would remove most of the requirements for legal representation of claimants. It has been suggested that the plaintiff lawyers have been acting to some extent in self-interest.

Defendants

There is little doubt that the typical asbestos defendant would favour an administrative Scheme, although their appetite for a Scheme will obviously be dependant on the terms of the scheme. It is less clear how so-called non-typical defendants would respond to a Scheme.

As stated earlier, the second wave and third wave of asbestos liabilities has significantly broadened the defendant markets, but many of these defendants will be aggressively defending their position by denying liability. They therefore may be reluctant to participate voluntarily on a Scheme. The defendant position will in large degree be influenced by their ability to collect on relevant insurance.

More recently another objective has clearly come to the fore, that of corporate citizenship and reputation. The value of such is demonstrated by the response to the Commission of Inquiry. Leaving aside the question of whether or not James Hardie acted within the law in their corporate restructuring process, the adverse consequences are demonstrated by the threatened product boycotts and earning downgrades

Government

Political pressures have been applied to the Federal government to implement a long term no fault compensation scheme for catastrophic injuries. As to whether compensation for Dust Diseases would fit within such a scheme is unclear, however, the underlying theme behind a long term no fault compensation scheme is that the Government should intervene to ensure that victims of catastrophic injury are not left uncompensated.

As for State Governments, the NSW government and the Queensland government in particular made clear their opposition to the government funding a shortfall in the James Hardie affair, as well as government participation in an asbestos scheme. More recently the NSW Government has stated that it could introduce a 'system' that would bring about broad changes to reduce legal and administrative costs for a range of defendants in asbestos cases.

Insurers and Reinsurers

Insurers basic argument in relation to indemnifying insureds is that they did not receive the right premium for risks written. Having said this, (re)insurers recognise their obligation to indemnify their (re)insureds according to the terms of the (re)insurance cover. (Re)insurer interests are generally aimed at mitigating their exposure and bringing finality, similar to the interests of defendants. Where the interests of (re)insurers and defendants differ is that defendants are primarily liable to the claimants and insurers are liable to the defendants.

Before (re)insurers are required to indemnify defendants, the onus is on the defendants to demonstrate entitlement to indemnification. There is more difficulty for Dust Disease liabilities because of the latent nature of asbestos diseases means that claims made coverages are not likely to be triggered, and because there are many different 'trigger theories' under which an insurer could be liable. The (re)insurer involvement in an asbestos scheme may at first glance appear to be a second order issue, The significant level of (re)insurance collectibles to the various defendants means that (re)insurers explicit or implicit participation is important.

General Public

Whilst wanting to be compassionate towards sufferers, the general public also wishes to minimise the total cost of compensation. A balance therefore needs to be struck between compassion and excessive compensation. Ultimately, there exists a social cost if a sustainable solution is not found. It is probably untenable for a government to fail to intervene if asbestos sufferers face inadequate compensation. At a minimum, the medical costs for asbestos sufferers would be met through the public health system.

7.2 Stakeholder Map

The interests of the various stakeholders fit within the spectrum between the adoption of an administrative scheme, and retaining the current court based system. In some respects, the interest may be diametrically opposed, however, it is reasonable to state that there exists a common desire by all stakeholders to deliver fair compensation to asbestos victims with minimal administrative burden.

The likely reaction of the various stakeholders to the options available is demonstrated below:

	Claimants and Support Groups	Unions	Plaintiff Lawyers	Asbestos Defendants	Government	Insurers	General Public
Administrative Scheme	✓✗	✗	✗	✓	✓✗	✓	✓✗
Maintaining the court based system	✓✗	✓	✓	✗	✗	✗	✓✗
Hybrid Scheme 1 Claimant Opt-Out	✓	✓	✓	✗	✓✗	✗	✓✗
Hybrid Scheme 2 Defendant Opt-Out	✗	✗	✓	✓✗	✓✗	✓✗	✓✗
Hybrid Scheme 3 Non-Exclusive scope	✓✗	✗	✓	✓✗	✓✗	✓✗	✓✗

✓ denotes a favourable disposition to the proposal.
✗ denotes an unfavourable disposition to the proposal
✓✗ denotes that the stakeholder desire towards the particular option may be dependant on the specific option, or the particular circumstances of the stakeholder

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Despite the generality of the table above it can be reasonably concluded as follows:

- The clearest divergence of stakeholder interest is with the current court based system. The interests of the claimant groups and the defendant groups are diametrically opposed.
- The only party that may be considered to be firmly against the statutory scheme option is plaintiff lawyers. This comment needs to be heavily caveated that the particular circumstances of the stakeholder may influence that stakeholder's perspective.
- The hybrid Scheme has the broadest conditional acceptance, but this is naturally dependant on the specific options and the particular circumstances of the stakeholder.

8. Conclusions

The problems that Dust Diseases pose in Australia is not likely to diminish in the short term, and there will remain a demand that a sustainable and equitable solution is found.

In countries other than Australia that have been exposed to asbestos for a longer period than Australia, such as the USA, the response has been to implement corporate restructuring Federal laws which has enabled the USA to retain a court based system of compensation for asbestos. These procedures have been criticised as being debtor friendly, but it is unarguable that these procedures have enabled to asbestos defendants to trade out of their difficulties and meet creditors claims. It also assumes that the defendant company has an ongoing business that it wishes to protect.

Whilst these insolvency procedures have assisted individual companies, it has not necessarily brought a sustainable and equitable solution to the problem of asbestos compensation in the USA. The implementation of the FAIR Act may be the sustainable and equitable solution to the asbestos compensation problems in the USA.

The dilemma faced in Australia is not inconsistent with other countries, and it might be possible to look to the USA as a blueprint of what might unfold. Reported claims of Dust Disease in Australia is on the increase with the peak years currently (in 2004) appearing to be at least several years in the future. Additionally the third wave of claimants is a real but largely unknown claimant class. In the absence of a sustainable and equitable solution in Australia, the future might pan out as follows:

- The increasing demands to fund asbestos claims will place stress on defendant companies and their insurers.
- This pressure on defendants and insurers will likely lead to insolvencies that, under the current insolvency regime will lead to unsatisfactory winding up of the company affairs and lack of relief to the claimants.
- As a result of the unsatisfactory outcomes under the insolvency process, the claimants will look for alternative funding sources of compensation, which will start with the Government and then turn to the peripheral defendants.
- The lack of consistency between the States will mean that inconsistent results are achieved such that some claimants may perceive they are disadvantaged, which will encourage forum shopping.
- The continuation and possible increase in forum shopping will lead to piecemeal legislation by different States.

The inevitable conclusion of the scenario outlined above is wholly unsatisfactory.

The threshold question that must be addressed is whether the Stakeholders want to retain the current court based system, or whether there is a desire to implement an Administrative Scheme. A hybrid approach is not unreasonable and from the Stakeholder analysis it would appear that such an approach would receive wider conditional approval. In an ideal world an Administrative Scheme that borrowed from different regimes might look as follows:

- The administrative processes of the DDB and DDT implemented throughout Australia
- The funding principles of the FAIR Act are adopted
- Increased certainty of compensation

To achieve this there needs to be a merge of stakeholder interests. Any solution adopted needs to be applied in a manner that is consistent with the Australian social environment. The success of any substantive change in compensation and structural change in the administrative processes will be judged on social, economic and political measures.

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