

Hardie law an overreaction

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IMPOSING NEW DUTIES on directors because of the misconduct of one company would be premature and extreme.

Hard cases make bad law. State and federal attorneys-general need to keep this old saw in mind when they consider their response to James Hardie's fast unravelling attempt to evade its liability to asbestos disease victims. It's easy to sympathise with NSW Attorney-General Bob Debus's view that Hardie is a rogue company needing retrospective legislation to make it pay up. Mr Debus's department is drafting legislation to do just that.

Other state attorneys-general have endorsed this. They're also entertaining the idea of broader reforms to "pierce the corporate veil" and make parent companies liable for the torts of subsidiaries, and even to impose broad "corporate social responsibility" duties on directors in addition to their traditional duty to shareholders.

In canvassing such a wide agenda at such short notice, the attorneys-general risk putting the cart before the horse. Hardie's name is being dragged through the mud because its board took extreme steps casting off its compensation vehicles and shifting its domicile to the Netherlands which had the effect of limiting its asbestos liabilities. There is no epidemic of such behaviour that might justify sweeping law reforms.

Imposing new duties on directors because of the misconduct of one company would be premature, extreme and counterproductive. There can be no certainty about whether and how much the law needs to be changed until the courts decide whether Hardie's restructure really does quarantine it from asbestos claims. As long as Hardie is prepared to keep the compensation vehicles solvent while this is thrashed out, any litigation and the negotiations between Hardie and unions should be allowed to run its course.

The negotiations help to explain the strategy of the attorneys-general. They are applying, in concert with the unions, a full body press to Hardie threats of litigation, public humiliation and legislation to make the company roll over. It's hard to blame them. And it's true that David Jackson, the silk who investigated Hardie and found it had misled the public and the court about the adequacy and security of funding for asbestos claims, also found that victims were unlikely to succeed in making liability stick to Hardie under existing laws.

Even so, the attorneys-general need to consider the broader ramifications including the impact on investors of what they're proposing. If the courts prove Mr Jackson right and negotiations also fail which is a big "if" given the reputational and commercial consequences for Hardie there may well be a case for specific legislation to remedy the injustice in the Hardie case. Retrospective legislation is almost always undesirable

because it offends the principle that people should not have to worry that future changes in the law may make past actions illegal. But in Hardie's case it could be the lesser of two evils, because it wouldn't have a serious impact on investors generally; most would recognise the exceptional circumstances and Hardie itself could hardly complain about governments taking steps to protect the interests of dying people.

By contrast, law reforms applying to all companies could make Australia a less attractive place to invest and they require careful and exhaustive consideration, preferably not in the heat of public debate.

The issue of making parent companies liable for the torts of subsidiaries is bound to come up, though Mr Jackson did not go this far. He did acknowledge that strict limited liability in corporate groups may not reflect contemporary public expectations and standards, but confined his proposals to companies that become insolvent with "substantial long-tail liabilities". The attorneys-general now have to balance contemporary standards with the known economic benefits of limited liability, bearing in mind that narrow exceptions already exist to the limited liability rule.

They should be much more wary of proposals to impose on directors new corporate social responsibility duties to the environment, workers, customers or the "community". Directors are already required to act always in the interests of the company or the shareholders as a whole. Imposing vague new duties on directors would be confusing and counterproductive; by giving them a menu of constituencies to worry about, it could allow them to pick and choose. In the US, where many states permit directors to consider wider constituencies, some directors have refused to entertain takeover bids contrary to the interests of shareholders on the grounds the bids might be bad for others.

This is clearly undesirable, and unnecessary. Governments have changed corporate behaviour in the past towards the environment and workplace safety through specific laws rather than general changes to directors' duties. If any legislative change is needed to remedy the Hardie injustice which isn't yet clear it should follow this principle.