4. Do you think certain sections of the Act are likely to cause concern and, if so, for what reasons? What sections, if any, would you like changed?

'There is a potential problem with the application of the Act to equitable claims. The adoption of the general six-year limitation period (s13) means that, in principle, the Act applies to all equitable claims, unlike most limitation acts, which only apply to equitable claims to a limited extent, leaving principles like laches to do the rest. Some equitable actions are covered by s27 (only added after the Bill had been introduced into Parliament, after the intervention of one of my colleagues at UWA), but it is likely that there will be cases which will not be satisfactorily resolved by the combination of ss13 and 27. Here, the difference between the Act and the Law Reform Commission's recommendations is that these difficult cases would have been dealt with by the general discretion to extend the ordinary periods. Another aspect of this problem is the law relating to mistake. Most Acts have special provisions for fraud and mistake which, in effect, adopt the equitable rule rather than the common law rule. One of the principal shortcomings of the previous law in WA (and one which led to the reference to the Law Reform Commission) was the fact that the common law rules on fraud and mistake still applied in WA. Under the new Act, we have reformed fraud (s38) but for some reason or other, no reform was made to mistake except to the extent that it is covered by s27.

'Some other provisions that give cause for concern are those relating to minor plaintiffs and those suffering from mental disability. The old Act produced very long limitation periods in such cases, and all jurisdictions in recent years have tried to amend their legislation to solve this problem in one way or another. This was usually done by a provision under which the ordinary limitation period keeps running against a minor who has a guardian to look after his or her interests (subject to certain exceptions, such as where the guardian or someone closely connected with the guardian is the defendant).

'The Law Reform Commission's recommendations influenced the approach recommended by the Ipp Panel in 2002, and the Ipp approach has been adopted (with individual variations) in NSW, Victoria and Tasmania. The WA provisions (ss30-37, 41-42 and 52-53), while attempting to do something similar, are much more complicated. For example, they have one rule for persons under 15 and another for persons aged 16 or 17 when the cause of action accrues. The relationship between the two rules is not easy to understand. Another difficulty arises under s36, where the limitation period in an action against a defendant in a close relationship with a person with mental disability is three years from the time when the relationship ceased – not an easy point to identify. These provisions suffer by trying to be too comprehensive. It remains to be seen how well they will work.' ■

Notes: **1** The Commission's report praises the Alberta model's 'limitations strategy' based on equitable principles rather than those of the 'common law.' The Alberta recommendation was adopted by the *Limitations Act* 1996 (Alberta), and similar legislation is now in force in Ontario and Saskatchewan. **2** It was supported by the Ipp panel in 2002 in *Review of the Law of Negligence*. The panel's recommendations now form the basis of the personal injury limitation provisions in NSW, Victoria and Tasmania. **3** Handford, *Limitation of Actions – The Australian Law*, Lawbook Co, 2004. **4** See p vii. **5** See pp 8-9: Handford refers to *Maxwell v Murphy* (1957) 96 CLR 26; *Allman v Country Roads Board* (1957) VR 581; and *Attorney-General (Vic) v Craig* (1958) VR 34. **6** (2000) 203 CLR 503. **7** See p13. **8** See p13. **9** Page 8. **10** See p28. **11** See p175 onwards. **12** *Howe v David Brown Tractors (Retail) Ltd* [1991] 4 All ER 30. **13** *Ackbar v CF Green & Co Ltd* [1975] QB 582.

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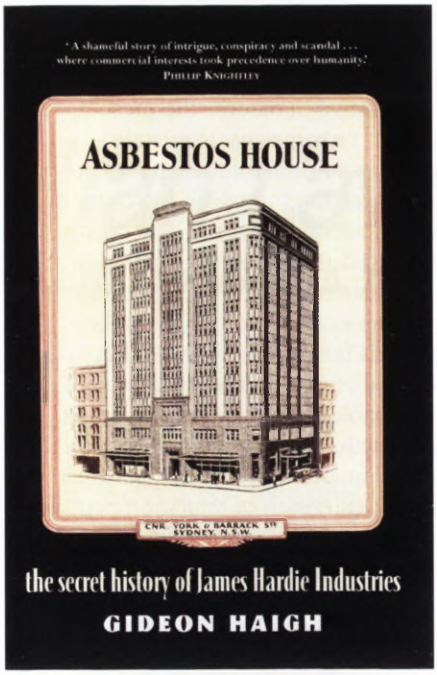

It's not often these days that plaintiff lawyers get praise in the national media for their work.

Yet journalist and author, Gideon Haigh, bestowed some in the *Good Weekend* magazine (*Melbourne Age* and *Sydney Morning Herald*) on 4 February 2006.

Reflecting on the tragic legacy of death and disease that was the consequence of massive asbestos use in Australia between the 1930s and 1980s, Haigh concludes:

> 'The group that has done the most to bring about compensation for victims of asbestos-related disease in Australia is neither government nor union. I began my research holding no particular brief for plaintiff lawyers, and I can understand complaints about the complications and cost they add to business. Yet without the tenacity of Melbourne's Slater & Gordon and Sydney's Turner Freeman, asbestos would have levied its human toll with impunity.'

And to the lawyers one could justifiably add the common law system and the once-level playing field of the common law courts of our country.

Those conclusions flow readily from the history of the hard-fought litigation that eventually rendered James Hardie

Asbestos house – the secret history of James Hardie Industries by Gideon Haigh

By John Gordon

and CSR accountable, which is well recounted in Haigh's book.

This is a work of tremendous scholarship and research. It tells with gripping effect the story of how James Hardie ignored direct warnings of the disease toll exacted by its relentless quest for profits from asbestos products.

With an eye for essential information distilled from corporate records and Commission evidence, it details the company's attempts to cut away its asbestos liabilities so that it could enjoy with impunity its burgeoning success in the building products market in the US.

There is, throughout, a keen sense of the human cost of corporate misconduct, but there are two instances where I must take issue with Mr Haigh's equanimity.

He recounts the exasperated views expressed by Hardie general manager, Frank Page, in 1969, upon reading an article sounding alarm about the dangers of asbestos. Page wrote:

> 'Like the rest of the asbestos-using industry, I am heartily sick of articles in the popular press and learned papers – so-called – which allege that Pliny and Strabo noted the occupational hazards of working in asbestos and then proceed to quote the housewife whose claim to fame was that she lived in a "pre-fab" for six months and had an "asbestos body" in a specimen of her lung tissue on death.'

Haigh avers that 'Page had a point'.

1969 was pretty much past midnight as far as the asbestos story in Australia was concerned. Asbestos companies overseas were placing warnings on their products. Hardie, nearly a monopoly manufacturer, did not do so for another ten years. Low-level exposures such as that experienced by Page's disparaged housewife were becoming a major concern as a mesothelioma risk, which has had tragic and massive fulfilment in the asbestos death toll in recent years. But not a concern, apparently, to Page and James Hardie. Despite years of inaction in the face of the evidence, here was the warning – and the opportunity – for the company to do something to avert the hundreds of deaths that would be caused by asbestos exposure in the building and insulation industries in the 1970s. Yet nothing was done.

Then there is the question of Hardie's attempted divestment of its asbestos liabilities in 2001.

In seeking approval for corporate restructure, the NSW Supreme Court was told that partly paid shares in the now Dutch-based JHINV would ensure access to the capital of the group was available to meet future asbestos liabilities. Two years later, the partly paid shares had been cancelled by the parent company and the 'lifeline' was permanently cut. And this despite clear evidence that the amount set aside in the now independent former asbestos subsidiaries was manifestly inadequate and likely to ensure that four out of every five future asbestos disease sufferers would not be compensated.

Gideon Haigh dismisses talk of a mephistophelian conspiracy in all this and suggests that the conduct of Hardie officers over the last five years 'seem second order offences' in contrast to the omissions and commissions of the previous generation.

It is hard to see why that conduct did not amount to misconduct of the first order. Although the consequence was not illness or death, its potential effect was to deny compensation to those who would become ill and die, compensation to which they were entitled as a consequence of Hardie being dragged to account in the courts. Given the horrors of asbestos disease, and the gratitude and relief of those suffering from it when they succeed in their battle to provide some financial support for those they will leave behind, one would have thought that any conduct that may have denied compensation to so many warranted much stronger condemnation. For its decision to authorise the cancellation, the Hardie board, (including its present chairman, Meredith Hellicar), must accept responsibility.

But these are personal impressions and reactions. The book itself is substantial and powerful. It should be required reading for every person who assumes a directorship in an Australian public company, every member of the executive committee of those corporations, every politician who wants to understand the dark side of Australian business, and every Australian concerned about what might become of our country and its equitable ideals, if profit and maximising shareholder returns are the sole arbiters of corporate decision-making and conduct. ■

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