

THE TAXATION TREATMENT OF LONG-TAIL LIABILITIES

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I. INTRODUCTION

Long-tail liabilities arise ‘where the conduct of a company results in individuals suffering a personal injury that will only become manifest at some indefinite future time, due to its latency period.’¹ These potential victims of harm are referred to as unascertained future claimants (UFCs). The most striking recent example of the issue of long-tail liabilities has been the claims by asbestos victims against the James Hardie companies.

In May 2008, the Corporate and Markets Advisory Committee (CAMAC) made recommendations as to the future recognition of long-tail liability claims. The CAMAC recommendations are concerned with improving the position of potential claimants in the course of the ongoing management of a company, or external administration of a company facing such claims. A problem with the recommendations of CAMAC is that four of the five recommendations are concerned only with the recognition of UFCs by companies in financial difficulties or in liquidation. The only CAMAC recommendation that deals with solvent companies considers the narrow case of companies proposing to reduce their share capital.

This paper will begin by examining the United States experience of providing for UFCs which was considered by CAMAC in formulating some of its recommendations. The recommendations of CAMAC will then be examined.

The paper will then examine the accounting treatment of UFCs in Australia. The Australian Accounting Standard 137, *Provisions, Contingent Liabilities and Contingent Assets*, provides for the disclosure of UFCs in company financial statements. However, Australian corporations law does not recognise UFCs as creditors and so UFCs are not protected in the event of company insolvency. Although the courts in Australia may take into account the interests of UFCs, this use of the courts’ discretionary powers does not amount to giving UFCs enforceable creditor rights.²

Australian income tax legislation does not consider the provision of long-tail liabilities, much less provide a tax deduction for the provision of long-tail liabilities. This paper will examine the current taxation treatment of provisions with a view to considering how the Australian income tax legislation could be amended to improve the position of potential claimants while giving companies facing such claims a taxation incentive to provide for such claims.

The paper will conclude by making recommendations as to how Australian taxation law could be changed to:

- Provide Australian companies with a tax deduction for making provision for UFCs; and, so,
- Provide potential claimants with enhanced financial protection in the event of a claim.

This paper does not propose to examine the details of the taxation affairs of the James Hardie group, nor the taxation issues that arose out of the specifics of the James Hardie settlement.

The issue of how best to provide compensation for UFCs, if and when their injuries become manifest, has been the subject of intense media attention, especially the James Hardie group’s treatment of asbestos claimants.

The Australian government has not, at the time of writing, responded to the CAMAC recommendations. Australian corporations law does not recognise UFCs as creditors and, so,

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1 Corporate and Markets Advisory Committee (CAMAC), *Long-Tail Liabilities: The Treatment of Unascertained Future Personal Injury Claims — Report* (2008) [1.3.1].

2 Ibid [2.3].

they are not protected in the event of company insolvency. Australia taxation law does not consider long-tail liabilities. A recent scheme, established in New Zealand, to provide taxation relief for businesses setting funds aside for environmental rehabilitation could be adapted to provide UFCs with some protection. The New Zealand scheme has not yet been tested by the business community to any great extent and there is virtually no literature, apart from New Zealand government comment on the mechanics of the scheme, to analyse the effectiveness of the scheme.

This paper, therefore, aims to initiate academic debate on the issue of UFCs and suggest that Australian taxation legislation could provide a vehicle for improving the financially vulnerable position of UFCs.

II. THE US EXPERIENCE

The Johns-Manville Corporation was a US-based miner and producer of asbestos for around 120 years from 1858 to the 1970s. The bankruptcy of the Johns-Manville Corporation in the 1980s led to the '1988 Plan of Reorganization',³ a trust established 'to distribute funds [to asbestos claimants] as equitably as possible while balancing the rights of current claimants against those of future unknown claimants.'⁴ 'The Trust was formed in 1988 to settle asbestos personal injury claims resulting from exposure to asbestos related products mined or manufactured by the Johns-Manville Corporation and its affiliated entities.'⁵

The aim of establishing the trust was 'a broad-based attempt to have a limited-fund class action certified as a means to revise the rules governing the order and method of claims evaluation and payment.'⁶ These aims were incorporated into the directives of the trust which were to 'enhance and preserve the trust estate in order to deliver fair, adequate and equitable compensation to [claimants], whether known or unknown, and to give full compensation to all claimants'⁷. By 2002, it became obvious that these aims had not been able to be achieved. When the Manville trust was established, it managed to pay '100 percent of the values allocated for a particular disease or condition, the flood of new claims reduced the payments first to 10 percent of those values and then to 5 per cent.'⁸

The US Bankruptcy Code was amended in 1996,⁹ as a result of the Johns-Manville experience, codifying that experience by the enactment of s 524(g).¹⁰ The new provision allows companies facing bankruptcy because of asbestos claims to use 'Chapter 11 of the US Bankruptcy Code ... to restructure their affairs',¹¹ therefore protecting the assets of the company from those claims, allowing the company to avoid bankruptcy and liquidation.

Chapter 11 of the US Bankruptcy Code allows a company facing bankruptcy to file a petition which 'immediately freezes the rights of all creditors, secured as well as unsecured, as at that date.'¹² The company then has time — 120 days — to file a reorganisation plan. This plan must be sent to creditors, and, if approved by a majority of each class of creditors (two thirds in value and one half in number) will be confirmed by the court. Court confirmation then binds the company and its creditors to the plan.

3 Marianna S Smith, 'Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust' (1990) 53(4) *Law and Contemporary Problems* 27, 29.

4 Ibid 27, 28.

5 Manville Personal Injury Settlement Trust <<http://www.mantrust.org/>> at 30 September 2009.

6 Smith, above n 3, 28.

7 Ibid 31.

8 Bruce T Smyth, 'Section 524(g) Asbestos Bankruptcy Trusts: Is the Cure Worse than the Disease?' (2003) 15(2) *Environmental Claims Journal* 171, 180.

9 Ibid 171.

10 CAMAC, above n 1, Appendix, 113.

11 Ibid.

12 *Bankruptcy Code* 11 USC § 362 (1996).

Chapter 11 only took account of a company's existing creditors and, as in Australian company law, failed to recognise the existence of potential UFCs. The new s 524(g) recognised only asbestos-related UFCs and gave them some protection in a Chapter 11 reorganisation by:

- setting out the prerequisites for using the s 524(g) procedure in a plan that provides for asbestos claims;
- requiring the establishment of a trust to meet asbestos claims;
- providing a specific court power to injunct present and future asbestos claimants; and
- establishing special protections for future claimants, including the appointment of a legal representative to protect their rights.¹³

Bruce T Smyth has argued that 'the asbestos reform of s 524(g) has not brought more fairness or rationality to, or reduced the volume of litigation of asbestos claims, but has in fact had the opposite effect.'¹⁴ Smyth has offered four reasons for the failure of s 524(g) reform as:

1. The relative ease of making a claim against a trust, as opposed to tort litigation, has increased the number of claims. Trust claims documents have 'minimal requirements of causation and proximately caused damages are easy claims to file and recover damages.'¹⁵
2. 'The lowered threshold of injury required to maintain an asbestos claim.'¹⁶ The lower threshold has come about because of the ability of non-malignant claimants and those with minimal or even no impairments to make a claim.
3. 'The lack of stricter requirements of medical causation.'¹⁷
4. 'Entrepreneurial incentives for plaintiff's counsel' provided by the lower obstacles to making a claim, coupled with 'the same rates of contingent recovery [for counsel] create an entrepreneurial incentive for plaintiff's counsel to locate and represent plaintiffs with low or non-existent levels of impairment.'¹⁸

In the absence of a national system of compensation for asbestos impairment being adopted,¹⁹ Smyth proposes a system that reverts to traditional tort litigation requiring all the elements: 'proof of actual damage to an existing plaintiff proximately caused by exposure to asbestos from an identified defendant.'²⁰

A national system of compensation for victims of the asbestos industry would be the most humane way of providing compensation. However, the moral hazard of allowing private, for-profit corporations to escape liability for injury caused by their operations is unacceptable. The traditional tort litigation process is lengthy, expensive and uncertain. Time and money are two commodities that people suffering asbestos-related injuries do not have.

III. THE RECOMMENDATIONS OF THE CORPORATE AND MARKETS ADVISORY COMMITTEE (CAMAC)

The CAMAC report *Long-Tail Liabilities: The Treatment of Unascertained Future Personal Injury Claims* was published in May 2008 and made recommendations in order to provide UFCs with some standing when companies with UFCs propose to reduce their capital or are facing financial difficulties. Of the five legislative initiatives proposed by CAMAC, three initiatives pertained to companies in, or facing, liquidation. Only two initiatives dealt with solvent companies, and one of those initiatives dealt with companies anticipating the likelihood of becoming insolvent.

13 Ibid § 524(g)(4)(B).

14 Smyth, above n 8, 194.

15 Ibid 192.

16 Ibid 193.

17 Ibid.

18 Ibid 194.

19 Ibid 196.

20 Ibid.

The CAMAC recommendations are:

A. Solvent Companies

- a) Under current corporations law, a company may reduce its share capital or buy back its own shares if the reduction in capital²¹ or the share buy-back²² ‘does not materially prejudice the company’s ability to pay its creditors.’²³ CAMAC proposed ‘broadening the interests to which directors must have regard in any capital reduction’²⁴ to include that the ‘proposed transaction not materially prejudice the company’s ability to pay its creditors or meet its contingent or other liabilities, including UFC liabilities.’²⁵
- b) Companies that anticipate the likelihood of becoming insolvent in the future ‘as UFC claims crystallize through the development of injury related symptoms’²⁶ would be able to ‘apply to the court for an order enabling its affairs to be conducted pursuant to a plan’²⁷ similar to the Johns-Manville plan described above. The CAMAC proposal ‘envisages mandatory court involvement.’²⁸

B. Voluntary Administration

In Australia, ‘voluntary administration is a process ... which allows a company to be placed under the control of an external administrator with a view either to its financial rehabilitation or its liquidation where corporate recovery is not possible.’²⁹ The parties to a voluntary administration are bound by a deed of company arrangement. This deed is executed between ‘various parties including the company,³⁰ ascertained unsecured creditors³¹ ... and any secured creditors³² who consent to being bound.’³³ Presently, UFCs have no standing in a voluntary administration and cannot be party to such a deed of company arrangement.

The CAMAC proposal is that ‘a representative [appointed by the administrator]³⁴ for UFCs should have standing to challenge in court a proposed deed of company arrangement. The representative would have the onus to prove undue detriment to UFCs under the proposed deed.’³⁵

C. Schemes of Arrangement

In Australia, there are broadly three types of schemes of arrangement: members’ schemes, creditors’ schemes and a combined member/creditor scheme.³⁶ Members’ schemes deal with ‘mergers or other forms of corporate reconstruction and amalgamation’³⁷ with only shareholders, or affected classes of shareholders, having the right to vote on such a proposed scheme.³⁸ ‘Creditors’ or combined member/creditor schemes, may take various forms,

21 *Corporations Act 2001* (Cth) s 256B(1)(b).

22 *Corporations Act 2001* (Cth) s 257A(1)(a).

23 CAMAC, above n 1, [5.2.1].

24 *Ibid* [5.2.5].

25 *Ibid* [1.5] (emphasis added).

26 *Ibid* [5.8].

27 *Ibid* [5.81].

28 *Ibid* [5.82].

29 *Ibid* [6.2].

30 *Corporations Act 2001* (Cth) s 444G(a).

31 *Corporations Act 2001* (Cth) s 444D(1).

32 *Corporations Act 2001* (Cth) s 444D(1).

33 CAMAC, above n 1, [6.2.7].

34 *Ibid* [6.61].

35 *Ibid* [1.5].

36 *Ibid* [7.1.1].

37 *Ibid* [7.1.2].

38 *Ibid*.

including partial payments to unsecured creditors in satisfaction of the corporate debt or a moratorium on creditor claims.³⁹ Only creditors have standing to be parties to, and be bound by, such schemes. UFCs are not considered by the courts to have ‘prospective or contingent claims’ under the *Corporations Act 2001* (Cth) and so do not have standing in schemes of arrangement.⁴⁰

The CAMAC proposal is for the court to appoint a representative for the UFCs ‘and require the preparation of an independent expert’s report on the impact of the proposed compromise or arrangement on the UFCs. The representative for the UFCs would have standing to make submissions to the court before it approves the proposed compromise or arrangement.’⁴¹

D. Liquidations

Currently in Australia, ‘a court may take a company’s potential liabilities to UFCs into account in deciding whether to exercise its discretionary powers to wind up a company. Beyond that, UFCs have no role or rights in a liquidation.’⁴²

The CAMAC proposal is for the court to ‘have the power in a liquidation to order the setting aside of funds in a separate dedicated trust for UFCs, where the court considers that this is worthwhile, taking into account the available distributable assets. ... The funds allocated to the trust would not have to be distributed before the liquidation is completed. Claims by UFCs would be confined to funds in the trust. UFCs would not have any other rights against the company.’⁴³

At the time of writing, none of the CAMAC proposals have been implemented into law. At the time the CAMAC report was released, in June 2008, the Minister for Superannuation and Corporate Law, Senator Nick Sherry, stated that the ‘Rudd Government is concerned to ensure that companies are not able to avoid their obligations so I welcome CAMAC’s report which we will consider closely.’⁴⁴ However, since that time the global financial crisis has intervened and there has been no movement by the Government to enact any of CAMAC’s recommendations.

IV. AUSTRALIAN ACCOUNTING STANDARD 137, *PROVISIONS, CONTINGENT LIABILITIES AND CONTINGENT ASSETS*

The objective of the Australian Accounting Standard 137 (‘AASB 137’), *Provisions, Contingent Liabilities and Contingent Assets* is:

To ensure that appropriate recognition criteria and measurement bases are applied to provisions, contingent liabilities and contingent assets and that sufficient information is disclosed in the notes to enable users to understand their nature, timing and amount.⁴⁵

AASB 137 applies to all entities required to prepare financial reports under the *Corporations Act 2001*, with reporting periods beginning on or after 1 January 2005.⁴⁶

39 Ibid [7.1.3].

40 Ibid.

41 Ibid [7.2.1].

42 Ibid [8.1.1].

43 Ibid [8.7].

44 Nick Sherry, *Minister Welcomes CAMAC Report on Long Tail Liabilities*, The Treasury <<http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/033.htm&pageID=003&min=njs&Year=&DocType=0>> at 30 September 2009.

45 Australian Accounting Standard Board, *Complied Accounting Standard AASB 137: Provisions, Contingent Liabilities and Contingent Assets* (2008) 8.

46 Ibid [1.1, 1.2].

Long-tail liabilities are the kind of contingent liabilities that are covered by the AASB 137. For the purposes of the standard, a contingent liability is defined as either:

- a) a possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity; or
- b) a present obligation that arises from past events but is not recognised because:
 - ii) the amount of the obligation cannot be measured with sufficient reliability.⁴⁷

The effect of AASB 137 is that the real potential of a future liability arising from UFCs is recognised, for accounting purposes, as a contingent liability.⁴⁸ No provisions are raised in the financial accounts for contingent liabilities; rather they are disclosed by way of notes to the financial statements. AASB 137 requires the entity with the contingent liability to ‘disclose for each class of contingent liability at the reporting date a brief description of the nature of the contingent liability and where practicable an estimate of its financial effect ... and ... an indication of the uncertainties relating to the amount or the timing of the outflow and the possibility of any reimbursement’.⁴⁹

The annual report of James Hardie for the year ended 31 March 2009 includes extensive notes to the financial statements explaining the status of asbestos-related liabilities. The notes explain how the amounts and timing of expected claims were estimated.⁵⁰ The notes then go on to provide, as at 31 March 2009, estimates of:

- Asbestos Liability, A\$1869.2m
- Insurance Receivable, A\$235.2m
- Deferred Tax Asset — Asbestos, A\$502.7m.⁵¹

The reporting by James Hardie indicates how AASB 137 translates into practice and the level of detail that readers of financial statements can expect in relation to UFCs. The Hardie reporting demonstrates that corporations are able to provide readers of financial statements considerable detail of their contingent liabilities. Contingent liabilities are able to be quantified and the timing of expected claims is able to be estimated. The fact that this level of detail is able to be provided lends support to a view that companies would be able to provide for contingencies by more than a note to the financial statements.

V. RECOGNITION OF UFCs UNDER CORPORATION’S LAW

Marina Nehme, in her article ‘Unascertained Future Claims: Current Issues and Future Reforms’,⁵² considers the recommendation by CAMAC and proposes further reforms to the *Corporations Act 2001* in order to improve the position of UFCs in a corporate scheme of arrangement or a winding up. In these situations, Nehme concludes that ‘unascertained future claimants are not considered as creditors; as a consequence, the protection given to creditors under the *Corporations Act* does not apply to them.’⁵³ The *Corporations Act 2001* contains no definition of creditor.⁵⁴ The *Corporations Act 2001*, however, does contain ‘the concept of debts

47 Ibid [10].

48 Ibid [86].

49 Ibid.

50 James Hardie, *Annual Report 2009* (2009) 99.

51 Ibid 106.

52 Marina Nehme, ‘Unascertained Future Claims: Current Issues and Future Reforms’ (2009) 17 *Insolvency Law Journal* 7.

53 Ibid 11.

54 Ibid 8.

or claims that are admissible to proof in winding up'.⁵⁵ This concept recognises the following claims:

- present claims;
- certain claims;
- ascertained claims;
- future claims; and
- contingent claims.⁵⁶

UFCs do not fall into the category of either present claims, certain claims or ascertained claims because they are a category of persons who are 'merely' potential victims of harm because their personal injury may only become manifest at some indefinite future time.⁵⁷ UFCs are a class of persons, as yet unascertained, but, from experience, such as in James Hardie, known to exist.

The question, then, is: are UFCs contingent or future claimants under the meaning of the *Corporations Act 2001*?

Judicial interpretation of these terms for the purposes of corporations law is similar to the interpretation of creditors under taxation law, as discussed below. That is, there must be an 'existing obligation'.

Nehme proposes that UFCs be specifically included in the definition of contingent creditors in the *Corporations Act 2001* in order 'to provide protection to this category of claimants when the company goes under insolvency'.⁵⁸ Nehme also proposed that the corporate veil be lifted for companies with UFCs in order 'to hold the parent company liable for long tail liabilities of its subsidiary if the holding company did not take into account unascertained future claimants liability of a subsidiary'.⁵⁹

VI. RECOGNITION OF UFCs UNDER TAXATION LAW

Under Australian taxation law UFCs are not recognised. The general deductions provision, s 8.1 of the *Income Tax Assessment Act 1997* (Cth), allows taxpayers to deduct from their assessable income

any loss or outgoing to the extent that:

- a) it is incurred in gaining or producing your assessable income; or
- b) it is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income.⁶⁰

Taxation Ruling 97/7, *Income Tax: Section 8-1 – Meaning of 'Incurred' – Timing of Deductions* ('TR 97/7'), considers the meaning of the word 'incurred' in s 8.1 of the *Income Tax Assessment Act 1997*. The ruling reiterates that 'to qualify for a deduction under section 8-1 a loss or outgoing must have been incurred'.⁶¹ As there is no statutory definition of 'incurred' the ruling states that:

As a broad guide, you incur an outgoing at the time you owe a present money debt that you cannot escape. But this broad guide must be read subject to the propositions developed by the courts ...⁶²

55 Ibid.

56 Ibid 9.

57 CAMAC, above n 1, [1.3.1].

58 Nehme, above n 52, 24.

59 Ibid.

60 *Income Tax Assessment Act 1997* (Cth) s 8.1.

61 Australian Taxation Office, Taxation Ruling 97/7, *Income Tax: Section 8-1 – Meaning of 'Incurred' – Timing of Deductions*, para 3.

62 Ibid para 5.

The courts have held that a loss or outgoing may be incurred even though no money has actually been paid out.⁶³ However, the liability must be ‘more than impending, threatened or expected’⁶⁴ and ‘what is clearly necessary is that there should be a presently existing liability’⁶⁵ and ‘it is not an existing liability if it is contingent’.⁶⁶

A long-tail liability is, for accounting reporting purposes (as shown below), not treated as an existing liability, but as a contingent liability. Clearly, for tax purposes, a contingent liability for UFCs would not qualify as an outgoing that had actually been ‘incurred’.

TR 97/7 does, however, allow taxpayers a deduction for ‘payments made in the absence of a presently existing pecuniary liability’.⁶⁷ The ruling states that:

Generally, a deduction is allowable because a liability arises necessitating the payment of an expense. However, some payments are not necessitated by a presently existing pecuniary liability, and they are incurred only upon payment. Examples of such expenses include gifts, insurance premiums, licence renewals and motor vehicle registration fees – these payments are at the discretion of the taxpayer, if the taxpayer wants those benefits.⁶⁸

In Australian tax legislation, there exists a farm management deposits (FMD) scheme which allows primary producers to even out their taxable income by depositing funds into an ‘authorised deposit taking’ institution. The ‘FMD scheme allows primary producers ... to claim deductions for FMDs made in the year of deposit’.⁶⁹ The FMD scheme replaced the income equalisation deposits scheme in 1999 and the name of the previous scheme hints as to the purpose of the present FMD scheme; that is, is to allow primary producers to even out their assessable income over various income periods.⁷⁰ Primary producers are entitled to a tax deduction for deposits made under the scheme in the income year in which the deposit is made. Conversely, ‘when an FMD is withdrawn, the amount of the deduction previously allowed is included in both the primary producers’ PAYG instalment income and assessable income in the repayment year.’⁷¹

Although the facility of FMDs for primary producers is provided for in a distinct division of the *Income Tax Assessment Act 1997*, it complies with TR 97/7 in that it allows primary producer taxpayers with a deduction for ‘payments made in the absence of a presently existing pecuniary liability’. FMDs are made at the discretion of primary producer taxpayers, if the taxpayers want the benefit of a reduction in their assessable income.

In New Zealand, the Inland Revenue department operates a scheme, which commenced in 2005, whereby a company can obtain a tax deduction for funds set aside to provide for the restoration of the environment from environmental damage caused by the company’s operations. The scheme is called the environmental restoration account (ERA) scheme.⁷² The scheme works by allowing companies a tax deduction for sums provided in the accounts for environmental restoration. The example provided by the Inland Revenue demonstrates the mechanics of the scheme:

2007 A company plans to set aside \$10,000 in their financial accounts to pay for future environmental restoration.
The company tax rate is 33%, so they deposit 33% of the money set aside in their ERA. That is, they send us (NZ Inland Revenue) a cheque for \$3,300. The other \$6,700 remains in the company’s bank account.

63 Ibid para 16, from *W Nevill & Company Ltd v FC of T* (1937) 56 CLR 290 at 302.

64 Ibid para 18, from *New Zealand Flax Investments Ltd v FC of T* (1938) 61 CLR 179 at 207.

65 Ibid from *Nilsen Development Laboratories Pty Ltd and Ors v FC of T* (1981) 144 CLT 616 at 624.

66 Ibid from *FC of T v James Flood Pty Ltd* (1953) 88 CLR 492 at 506.

67 Ibid para 21.

68 Ibid.

69 Robert L Deutsch et al, *Australian Tax Handbook*, (2009) 1427.

70 Ibid.

71 Ibid.

72 New Zealand Inland Revenue, *Environmental Restoration Account Scheme* <<http://www.ird.govt.nz/business-income-tax/expenses/environmental/bit-exp-env-erascheme.html>> at 30 September 2009.

They can claim \$10,000 as a deductible expense in 2007 which reduces their tax bill by \$3,300.

2008 We pay interest at 3% pa on the money deposited which is taxable in 2008.

2009 The company pays \$10,000 on restoration work. They can claim a \$3,300 refund. This triggers assessable income of \$10,000 (refund divided by 33% tax rate), which is offset by the \$10,000 environmental expenditure that the company incurs.⁷³

The New Zealand scheme allows companies facing costs caused by environmental damage that arose out of their past business operations a deduction for providing for those costs. The amount of the tax deduction is set aside in a government-controlled fund. This scheme, like the Australian FMD scheme, allows companies to decide how much will be set aside in any income year. The major difference is that when the funds are required to restore the environment, the funds must be used for that purpose. The advantage for UFCs is that, even if the company with the UFC liability should cease operating, some funds will be available to UFCs when their injury becomes manifest.

The scheme was introduced because in New Zealand it was found that there were 'problems in matching business income and tax deductions for environmental costs incurred on or after the cessation of business. Even if a tax deduction was permitted it was likely to give rise to a tax loss of limited value.'⁷⁴

VII. CONCLUSION

Potential victims of harm from contact with asbestos face uncertain futures. Their health may not be affected by the contact, or they may suffer health complications ranging from minor pleural plagues and thickening to asbestosis, other cancers or mesothelioma.⁷⁵ Most sufferers of pleural plagues and thickening suffer no impairment or only minor impairment in performing their daily activities, while mesothelioma is almost always 'fatal within six to eighteen months after diagnosis.'⁷⁶ Added to the health uncertainty faced by UFCs is the financial uncertainty of ever succeeding in a claim for damages.

The recommendations made by CAMAC in May 2008, concerned with improving the position of UFCs, deal mainly with improving the standing of UFCs with potential claims against companies in financial difficulties or in liquidation.

This paper recommends that changes to taxation law could be made to improve the financial position of UFCs when the time comes for them to make a claim by:

1. Allowing companies with a contingent liability for UFCs to raise a tax deductible provision for UFCs.
2. Allowing the tax 'saved' by the company to be paid into a government-managed UFC claims account (similar to the New Zealand ERA scheme).
3. Establishing a process for administering claims, similar to the Johns-Manville scheme, and administered by the company with the government. In New Zealand, the government agency administering the scheme is the New Zealand Inland Revenue.⁷⁷

This proposal allows the company providing for UFCs to do so at no cost to their cash flow. The scheme would also encourage prudent financial behaviour by companies with UFCs while they are a going concern.

The advantage for UFCs would be that, if and when they needed to make a claim for compensation due to the manifestation of an asbestos-related condition, they would be assured of a claims process and some funding to cover their potential claim.

73 Ibid.

74 New Zealand Inland Revenue (2005) 17(7) *Tax Information Bulletin* 23.

75 Smyth, above n 8, 173.

76 Ibid.

77 New Zealand Inland Revenue, above n 72.

The above proposal could not guarantee that all persons with an asbestos-related disease would be adequately compensated. The proposal could not guarantee that all companies facing future claims for asbestosis damage will make provision for that damage. However, the scheme allows companies who face the prospect of asbestos claims in the future to attempt to provide for those claims while they are a going concern. Potential victims of asbestos harm would be provided with some compensation which, although it may be inadequate, is better than no compensation. This proposal does not offer a distribution scheme for potential claimants. The distribution scheme would need to be calculated and monitored by actuarial and insurance specialists when the schemes were being established.