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"ASBESTOS AND FIRE"

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"Asbestos and Fire"

DR FRENCH: I would just like on behalf of the committee to welcome everyone here tonight and, in particular, to welcome Mr Jack Rush RFD QC and his wife Mrs Sandi Rush. We are very honoured and thrilled to have Mr Rush talking here tonight.

Mr Rush has been in practice at the Victorian Bar for a long time and during that period was at one point chairman of the Victorian Bar Council. He has a very impressive list of things that he has done over his time at the Bar. His practice is primarily in trial and appellate advocacy, predominantly in common law cases, product liability, insurance law, personal injury, criminal law and trade practices and with many highlights and I am just picking out a few, some of which are relevant to what he is going to be talking about tonight.

Representing miners and residents who contracted asbestos disease as a consequence of working and living at the Wittenoom mine in Western Australia; counsel in a number of significant class action cases including breast implant litigation both in Australia and the US; also relating to issues of persons acquiring HIV and hepatitis C as a consequence of use of contaminated blood product.

He was counsel for Lorna Cubillo and Peter Gunner in the stolen generation's case and also counsel for Rolah McCabe in the case against British American Tobacco; counsel for the unions and victims group in the Commission of Inquiry of New South Wales into funding by James Hardie of compensation for Australian victims of asbestos exposure; counsel assisting the Coal Inquiry into the loss of the HMAS Sydney 2 and most recently, as I'm sure people

have seen on television in Victoria, counsel assisting the Royal Commission into the Victorian bushfires of 2009. Has also done some interesting and different things like being Chairman of the AFL Grievance Tribunal involved in deciding disputes between players and umpires and clubs and he's a captain in the Royal Australian Naval Reserves, so a very interesting career and background.

It is with great pleasure that I would like to introduce Mr Rush to talk on the topic tonight "Asbestos and Fire".

MR RUSH: Ladies and gentlemen, I received some advice earlier in the week from one of your legal members and he indicated my debut speech at the Medico-Legal Society should be amusing; people relaxed on a Friday night and they would laugh at anything. I had to advise him that that could be very difficult, I was talking about some reasonably serious issues.

But the word "debut" did strike a chord and it brought to mind the great football commentator Jack Dyer, talking long ago about the Melbourne footballer Les Bamblett. "Bamblett made a great debut last week and an even better one today". This was said by Dyer in describing a game of football, Fitzroy v. Melbourne, where he summarised the game "Fitzroy has copulated to Melbourne".

I was rummaging through some old papers over January to tidy up my Chambers. There was a lot of rain in January. It's extraordinary the artefacts and mementos that are stored away. There was a lot of old transcript. I can give you a couple of examples of why I kept it. Daryl Wraith the barrister cross-examined a victim in

custody over his prior convictions. Wraith: "What was the nature of the aggravated burglary and riotous behaviour, that's all I'm asking". Accused: "I stole some purses". Wraith: "Assaulted some nurses?" Accused: "What I said was 'stole some purses', you idiot, get it right". Wraith: "Already, all right, you stole some purses". Magistrate: "If you're not careful you could well be charged with contempt of court if you carry on". Accused: "I'm already locked up, what else could go wrong?"

Old speeches - I'm at the Green Enviro in January - I should tell you about two. Welcome speech for Justice Stuart Morris when he was appointed to the Supreme Court, a position that he has since retired from and come back to the Bar, and it related to a period of time when Stuart Morris was President of the Planning Appeals Board. He was hearing an application by Bob Jane for a permit to extend the Calder Park Speedway known as the Thunderdome.

The critical issue was the noise made by a particularly fast and noisy type of dragster known as "the top fueller". The discussion turned as to how this vehicle might be described in a permit condition so as to impose restrictions on its use. Morris asked Bob Jane how top fuellers might be described. Bob Jane thought for a while then replied "I'd call them nitro-fuelled jet cars. I mean even if your wife would understand that". Stuart Morris responded proudly, "My wife's got a PhD". Jane again thought for a while and then offered the observation "Well, tell her to go and put some nitro in it and then it will really go".

There was of course little place for humour in the bushfires Royal Commission. It's eight months since I

finished at the Royal Commission; it's eight months or 16 months after the most intense and difficult times, distressing work encountered in my time as a barrister. I think for many of us the way we operate is to shut out the emotional and stressful part of our work but the shutting out process is sometimes difficult, it is essential to enable the meeting of timelines and proper procedure. Nevertheless, it always comes at some cost.

It has been an unusual time in that it was not until the conclusion of all the evidence that the real impact of the fires on people began to sink in. It was a terrible day and I cannot get out my head how much that devastation could have and perhaps should have been avoided.

Before going on to consider some of the detail, it is necessary to acknowledge some real positives because at one level the Royal Commission spent through necessity a considerable time in negative territory as we investigated and then criticised key aspects of some sections of emergency services on the day.

An overwhelming impression for me is the response of the Victorian community: generous, caring for each other; acts of extraordinary bravery and sacrifice; a great generosity of spirit. People in those early days exemplifying the enthusiasm and the initiative and the commonsense that is such an important part of our national character. The state asked much of its volunteers - time and continuing commitment.

These bushfires surely tested that resolve and loyalty. Some of the evidence was graphic. CFA personnel having to identify bodies of people they went to school with; volunteers having to check the charred remains of

people in cars – whole families, sometimes neighbours discovered dead, often huddled together in a last desperate attempt to find shelter.

Evidence at the Royal Commission convinced me that the CFA as an organisation is of the utmost importance to this state. To many local communities the CFA is a unifying and powerful force of community cohesiveness and cooperation. The idea of service exemplified by the CFA is an attribute that should never be lost. I do not think in 155 days of hearings one volunteer was the subject of criticism for actions on 7 February. This was not an oversight or some deliberate tactic.

The fact is that without exception across the state the volunteer effort was quite remarkable. Despite the lack of criticism one matter I think we underestimated was the stress for those who fought the fires and held positions of responsibility on 7 February in giving evidence and being cross-examined at the Royal Commission.

I listened to an address given by the captain of the Kilmore Volunteer Brigade just a couple of weeks ago. He graphically described the preparation of his statement for the Royal Commission over days; his preparation with lawyers for giving evidence then facing the Royal Commission at that time in the County Court sitting in the witness box of a criminal court: cameras, the media, the intense scrutiny. He was an excellent witness and a true leader yet he confided at this event just weeks ago that this was the first time he had been able to speak of all of the events without breaking down.

The experience of examining 173 deaths had a great and continuing impact on the lawyers and counsel assisting

at the Royal Commission. Let me give you one example. Rob and Natasha Davey with two daughters, Georgia aged three and Alexis eight months lived at Bald Spur Road, Kinglake. I read from the final report of the Royal Commission: "At about 6.15 p.m. Ralph Cosh, Sandra's husband, called the Daveys. Natasha answered and yelled 'Going fire' before hanging up. At 6.20 p.m. Natasha used Rob's mobile to call 112, the Emergency Services number. She spoke to the operator, describing fire in the roof and computer room of the house and could be heard moving children into the bathroom. The operator lost voice contact with Natasha but the line remained open for about six or seven minutes. On 9 February Rob, Natasha, Georgia and Alexis were found lying close together in what had probably been the bathroom, their house completely destroyed".

A phone call to Emergency Services is as distressing a recording that you could imagine. Here was a family that had done everything to comply with the stay or defend policy, overwhelmed by fire, their remains found huddled together. The contents of the call were not played publicly but of course we heard the recording and it is very hard sometimes to put that in context let alone put it out of your mind. The Royal Commission had a big impact on many.

I am often asked where I was on 7 February. My answer is explained by this photograph. My then work, I was involved in another inquiry, an inquiry that had been established through the Department of Defence into the loss of HMAS Sydney 2 with counsel assisting Terrence Cole. This photograph depicts the ship's company in a

triumphal march on 11 February 1941 through the streets of Sydney. The ship had returned after an outstanding campaign in the Mediterranean where it sank the Italian battlecruiser Bartolomeo Colleoni. Just nine months later nearly every person dressed in white in that photograph would be dead.

To give some context to that, on 19 November 1941 Sydney was lost in an engagement with a German raider off the Western Australian coast. When I say "lost", the ship and her entire crew of 645 in effect disappeared. Over 200 of the German crew of the raider Kormoran survived. Australia was then a country of just over seven million people. It was Australia's largest wartime loss in the sense of its greatest loss in a single war engagement. The impact on the nation in 1941, as would understand, was profound. Thus, from Australian's greatest wartime tragedy to Australia's greatest peacetime tragedy.

Many Victorians, those not directly impacted, the scale and ferocity of the fires on 7 February was not appreciated. I listened to Jon Faine on 774 at around 6.00 p.m. on the day. Really, it has to be said there was no hint of the magnitude of what was happening at that very time in Kinglake, Marysville, Beechworth, Calignee.

Bernie Teague was determined to make the Royal Commission as open and as accessible as possible. Internet streaming of proceedings was an innovative but highly effective way of ensuring that anyone could observe the proceedings without the necessity of being in Melbourne and the openness of the Royal Commission was unparalleled and I think an unparalleled success.

Counsel assisting's point of view, our first work,

was to read and familiarise ourselves with the reports that had been written into previous bushfires in Victoria. If I read to you a description of the drought and heat of the fire of 1851 you would say that could be 2009. If I read from the Stretton report of the fires of 1939 you would say that could be 2009. If I read from the report of the Ash Wednesday fires of 1983 that could be 2009.

We quote "The year had been one of exceptional heat and drought. Pastures had withered, creeks had become fissured clay pans, waterholes had disappeared, the very leaves upon the trees crackled and appeared to be as inflammable as tinder. The air which blew from the north resembled the breath of a furnace, a fierce wind arose, gathered strength and velocity from hour to hour until about noon it blew with the violence of a tornado. For some explicable means you wrap the whole country in a sheet of flame. Men, women and children, sheep, cattle birds and snakes fled before the fire in common panic. The air was darkened by volumes of smoke, relieved by showers of sparks, forests were ablaze and on the ranges the conflagration transformed their wooden slopes into appalling masses of incandescent columns and arches".

This was a description of the fire in Victoria in 1851. It most certainly could have been 2009. That a major bushfire is inevitable in this state is a lesson of history. The other constant theme through report after report is the emphasis upon timely and useful information regarding prediction of the spread of fire. This will enable potentially affected persons to make informed decisions. Was it too much on 7 February 2009 that our citizens would be provided with a predicted course of

fires that spread into predicted locations so that informed decisions could be made.

Warnings were of particular significance on 7 February. It was appreciated that if fire broke out on 7 February in the absence of successful, initial attack such a fire would quickly burn out of control and in the anticipated conditions would be incapable of being contained, incapable of being fought.

This graph gives some idea of what we are talking about. At the bottom of the graph 1,000 kilowatts of intensity per metre and so we go up to 10, which is the current limit to suppression for direct attack, that is aircraft machines and personnel. I'm sorry, that's at 4. At 10 you get an act of ground fire which is fire in the tops of the trees.

As you see, on Black Saturday right at the top of the page, "Black Saturday 7 February 2009 burned at a velocity of approximately 80,000 kilowatts per metre". It was an incredible fire, much worse than Ash Wednesday 1983 and, as you would see, much worse than Black Friday of 13 January 1939. So direct attack by conventional means of firefighting was out of the question and known to be out of the question if fire was to break out.

Flame height on this day was observed to leap 100 metres or more into the air. Radiation from flame makes survival within a distance of three to four times flame height difficult. Flame temperatures were between 900 and 1200 degrees centigrade. To try and understand what went on on the day we initially concentrated on the Kilmore fire. This fire killed 121 people, destroyed 1244 homes. It started at 11.50 a.m. as a consequence of the failure

of a single electricity conductor spanning a gully a kilometre wide and the electrical arcing started the fire.

The north-easterly wind velocities across the fire-affected regions were in excess of 100 kilometres per hour. The FDI that you see there exceeded 100 and it is said that once under way the fire could not be stopped. An incident control centre was meant to be established at Kilmore as established in other areas around the state. It was meant to be ready for what was called "a hot start", experienced people would be in place and ready.

The establishment of an incident management team is seen as critical for proper management of fire. Despite assertions of proper preparedness, the level 3 control centre being in place ready for a fire, there was in fact nothing in place at Kilmore. The captain of the Kilmore brigade was on duty with his brigade members. He despatched the Kilmore tankers to the fire. He was telephoned at approximately twelve o'clock by the regional officer for CFA who informed him that he was to be the incident controller for the fire. As I said, nothing in place.

The local captain thereupon set about pulling his members off the trucks, quite literally undertrained people and experienced people who had never worked together to try and fulfil his incident management team. Over the course of the afternoon, others came to Kilmore. The incident controller captain was not level 3 qualified. Those put into critical IMT positions were not level 3 qualified and these people were completely unaware of each other's skills and qualifications. They had not been properly trained individually or as a group to cope with

the stress or the pressure that was to come.

In short, that lack of preparation meant the communications between the fire ground, aircraft and the incident control centre were deficient to very little. The incident control centre was not provided with proper and important information in what is terms the IECC, the state control centre in Melbourne. Warnings to the communities in the path of the fire were deficient, late and in some cases non-existent.

Just a couple of examples: We see here is a line scan that was taken over the fire at 12.48 just close to one hour after the fire started and this is taken from an aircraft flying over the fire with infrared equipment and the photographic image is sent straight back to the state control centre based in Melbourne. The aircraft did a return run over the fire at 12.55, 12.58.

What the experts were able to tell us just in that time, looking at those line scans, was that it demonstrated an increase in the size of the head of the fire and the fire body itself in just ten minutes and it was an incredibly intense fire and that the fire was spotting, creating other fires, ahead of itself.

Between the two line scans the experts were able to tell us that the plume of smoke had in fact drawn the fire together. The effect of the smoke plume on fire to me was a stunning piece of information. Heat and combustion products rise in the smoke plume, as the hot air rises it must be replaced. This can create great wind velocities at the base of the fire. Indeed, in some areas the wind was of such force that the trunks of trees snapped. Rapidly rising air creates pyro cumulus cloud and on 7

February smoke, plume and cloud of the Kilmore fire reached a height of 8,500 metres. The instability of the smoke plume created what was a fire-induced understorm with the lightening creating further fires in catchment areas after six o'clock that night.

The upper winds were more westerly than the winds on the ground but the upper winds drove the smoke plume such that the fire was dragged in a more easterly direction by the upper winds - an extraordinary effect. These line scans, as I said, were sent direct to Melbourne. They never arrived at the incident control centre at Kilmore nor was the incident controller ever informed of the nature of the information that they contained. They provided important information in relation to fire prediction.

Behaviour experts were working in the state control centre in Melbourne. They produced a prediction map of the fire at 3.15. The prediction map shows that towns such as Strathewen, Kinglake West, Kinglake, Steels Creek, Dixons Creek, as far out as Flowerdale could be potentially impacted by this fire. The map was never provided to the incident control centre at Kilmore.

Indeed, at the state control centre the three leaders of the fire and emergency service organisations had a good knowledge and understanding of where this fire would potentially run. It is demonstrated by the following evidence: "As soon as we saw the Kilmore East fire, in a very short time we knew we had a real problem. It was turning towards populated areas. You could run a ruler towards where it would run; you knew straight away, as the evidence revealed, the ruler headed to Kinglake".

Warnings are loaded to CFA websites and broadcast on 774 emergency radio. The issuing of warnings is the responsibility of the information officer working at the incident control centre. At the outbreak of the Kilmore fire there was no information officer. An information officer did not arrive until late afternoon. Warnings were issued through the Seymour office of CFA. The person responsible for the warnings had no contact with those on the fire ground, little contact with those at the Kilmore incident control centre and he was distracted performing the duties that had previously been allotted to him. The warnings concerning the Kilmore fire reflected what was in place.

Between 12.40 and 2.25 there were no warnings provided concerning the Kilmore fire. At 2.25 a warning was provided indicating that the fire was not currently posing a threat to communities: this, despite what was reported by ground crew who gave evidence at the Royal Commission of this being the most intense wild fire they had ever encountered and at 2.25 the fire was in fact tracking into the Kinglake mountain and the whole of that area was at risk.

At 4.10 an urgent threat message was issued by the Kilmore incident control centre to warn the communities of Mt Disappointment, Kinglake, Strath Creek, Reedy Creek, Humevale that they be directly impacted by the fire. This, it stated, was an urgent threat message. Although issued at 4.10 it did not reach state control centre until 4.35. The message was never loaded to the CFA website. At 5.41 an urgent threat message was issued by Kilmore ICC to communities from Kinglake to Flowerdale and, as you

see, an enormous area, an appreciation of the enormity of the event almost six hours after it started. The message was posted to the CFA website at 5.55 p.m. and by then it was all too late. Strathewen, Kinglake, West Dixons Creek, Humevale, all those towns with the names of which we are now so familiar had been struck by the fire.

Not one warning from Kilmore or from the state control centre was given to Victoria concerning the anticipated south-westerly wind change. Those who live in the city the change is a relief, for firefighters it is a totally different matter. Typically, in a bushfire, 80 per cent of the area burned occurs with the wind change. Ash Wednesday 1983 and the 1977 fires in the Western District, indeed the experience of the fires that burned in the Western District on 7 February when the change came early to the Western District demonstrated the impact of this wind change.

Here we see a graph demonstrating the common fire behaviour. In the black, a normal course of the fire then with the south-westerly wind change fire spreading out from the course with which it had run. That impact is perhaps demonstrated here by what occurred in the Kilmore East fire. This depiction with the red arrow shows a fire burning under the effects of the north-easterly wind, so there is a fairly narrow band. Ahead of the fire was estimated - the part of the fire that leads was estimated to be four kilometres wide. Here we see the effect of the south-westerly wind change and the enormity of the damage from a fire front of approximately four kilometres. This fire turned into a fire on its western front of approximately 35 kilometres. It was an enormous fire.

Not one warning in relation to the south-westerly wind change.

From time to time, of course as counsel assisting, we questioned our approach. 20/20 vision of hindsight is of course all very easy but I think the evidence demonstrated a complete breakdown, a failure at the control centre in Melbourne and a failure to properly run and properly manage warnings to the community not only of the Kilmore fire.

Council assisting were accused of headhunting and going after scalps. It was put that it was unnecessary to focus on the tall poppies and it was said there was no advantage in relation to the Commission and the inquiry or the future by doing so. I can only say the command and control that is exercised on 7 February was, in my view, unacceptable.

The job of the Royal Commission under the terms of reference would not have been complete if this had not been properly investigated, exposed and hopefully remedied by recommendations. I think there is much that has come out of the Royal Commission that will be of great benefit to the community, yet I detect two years after February 2009 that bushfires and the community, it is already starting to be forgotten. The effluxion of time has eased the pain, the loss and deadened the lessons learned. The message of preparation for bushfire does not carry with it, in my opinion, the practical lessons that were learned as a consequence of the Royal Commission, which is probably the title of another paper.

I was asked to speak on asbestos and, as you would appreciate, the residue of asbestos as a consequence of

the damage to buildings in these fires was an issue in the cleanup in 2009. It is now appreciated that just a slight exposure to asbestos fibre can many years later cause lethal disease. Asbestos litigation I think has always had its controversies. Costs to insurers over the years has been enormous.

In 2002 Equitas, the reinsurance vehicle, which assumed Lloyds of London's enormous liabilities stated "asbestos claims were the greatest single threat to Lloyds of London's existence". Asbestos claims involve a retrospective assessment of the standards of many years ago. The process always involves controversy but it is a common process in most litigation.

Dr Julian Lee, a respiratory physician addressed the Medico-Legal Society of New South Wales in 1993, its title "Yesterday makes today mean". The point that Dr Lee sought to make was "We should not fall into the trap of judging yesterday by today's standards". He went on, "Of course we always do and we do it in areas of life, particularly in litigation".

Dr Lee was speaking in the context of asbestos litigation in particular and I have no doubt that Dr Lee was particularly addressing what was then, after long trials in both Victoria and Western Australian Supreme Courts of then recent verdicts where the owners of the Wittenoom Mine were found to have failed to meet standards of a reasonable employer in the way they exposed their workers to asbestos. Dr Lee had given evidence on behalf of the mine in the Western Australian case.

One of those cases, the Victorian case of Rabenault, the jury in fact awarded not only compensatory damages but

exemplary damages against Australian Blue Asbestos Pty Ltd (a subsidiary of CSR that ran the mine) because that company had demonstrated a contumelious disregard for the health and welfare of the plaintiff.

Thus Rabenault, a German migrant, later a successful businessman in Melbourne, who in 1960 was required to stuff raw asbestos fibre into hessian bags by hand with no mask or protective equipment. He wore a pair of football shoes. The jury's finding was that this was unacceptable.

Let me provide a couple of examples of the evidence that perhaps may have supported the jury's verdict. In 1898 the inspector of factories in the United Kingdom reported as follows: "The evil effects of asbestos dust have also attracted my attention. Microscopic examination of this mineral dust which was made by Her Majesty's medical inspector, clearly revealed the sharp, vastlike jagged nature of the particles and where they are allowed to rise and remain suspended in the air of a room in any quantity the effects have been found to be injurious as might have been expected".

In 1930 a significant report on the effects of asbestos dust on the lungs was issued by the medical and engineering inspectors of factories in Great Britain. A description of asbestosis, a fibrotic condition of the lung caused by inhalation of asbestos, provided a strong message as to the dangers of the substance. Asbestosis was described as "The slow growth of scar tissue between the air cells of the lungs wherever the inhaled dust comes to rest. While new fibrous tissue is being laid down like a spider's web that deposited earlier gradually contracts. This fibrous tissue is not only useless as a substitute

for the air cells but with continued inhalation of the causative dust by its invasion of new territory and consolidation of that already occupied it gradually and literally strangles the essential tissues of the lungs".

By the 1930s and 1940s asbestos was associated with the development of lung cancer. In 1942 medical text "Occupational Tumours and Allied Diseases" by Hueper elected the growing number of reports associating carcinoma of the lung with asbestos exposure. Dr Douglas Shiels in the late 1930s through to the 1950s was the medical director of industrial hygiene with the Victorian Department of Health. He was a pioneer in his field. He said he was responsible for the harmful gases, vapours, fumes, mist, smokes and dust regulations of 1945. Regulations were applicable to Victorian factories and workplaces.

As a consequence of the regulations, by law it was an offence to expose workers to a concentration of dust including asbestos dust that exceeded five million particles per cubic foot. As was stated in 1942, that concentration of five million particles per cubic foot of air is a very small concentration, so small in fact that the condition may look good even to a critical eye and still present an exposure greater than this low limit. The only safe procedure is to have recourse to actual dust determinations. This is especially important when the injurious condition is not immediately evident; it requires years to develop.

Professor Eric Saint was the foundation professor of medicine at the Royal Perth Hospital and later Vice-Chancellor of the University of Queensland. He was a

compelling witness in the Wittenoom trials. He was able to give an exact contemporary picture. After service in the RAF he migrated to Australia and joined the Royal Flying Doctor Service in Western Australia. He flew to Wittenoom on a number of occasions in 1948. He wrote to his superior in Perth in 1948 stating that the mine and mill at Wittenoom - "It would produce the most lethal crop of asbestosis in the world's literature".

He was literally shocked by the conditions of exposure at Blue Asbestos that he saw. He personally warned the mine manager of the dangers, indicated his warning had little impact, describing the mine manager in his correspondence to his superior as "the local El Duce". Reports in Scientific America, Encyclopaedia Britannica and the Medical Journal of Australia in the 1950s discussed asbestos as a carcinogen.

Wagner, a pathologist of South Africa, co-authors - highlighted the disease of mesothelioma in the British Journal of Industrial Medicine in 1960. 33 cases of mesothelioma were analysed. Histories of a number of these people indicated a brief exposure to asbestos in the North-West Cape Province that produced mesothelioma: Storekeeper, an accountant, persons with just transient exposure were diagnosed with mesothelioma. Not long after Dr James McNulty, a medical inspector of mines in Western Australia, another critic of the Wittenoom mine, reported in the Australian Medical Journal of the first case of mesothelioma in that mine.

In the British Medical Journal in 1965, epidemiologist Neuhausen reported on a series of 83 patients from London hospitals who had been diagnosed with

mesothelioma. These cases included persons who lived in the same house as an asbestos worker, others who lived with in half a mile of an asbestos factory. The reports I think highlighted minimal exposure was necessary for the contraction of this fatal disease, yet it might be said all this seemed to wash over James Hardie.

Internal document tendered in numerous cases dated 16 February 1966 and the personnel manager of James Hardie commented on a newspaper article that had been referred to him by the managing director of the company: "The article is not new, it is merely one of many reports on world studies which have been conducted since 1935 when the association between exposure to dust, carcinoma of the lung and, later, mesothelioma of the pleura and even tumour of the bladder and uterus were first recognised. The nucleus is dust particles. The only preventative action is to eliminate the presence of dust. The best advise you can give", he wrote "ignore the publicity, dust is a fact, denials merely stir up more publicity".

A year later in 1967 a further internal document commented "On the other hand, there appears to be developing an increase in tendency to question the safety of the finished product, asbestos cement. It is unlikely the cutting of a few lengths of asbestos sheeting for domestic purposes would be dangerous. Nevertheless, it is inadvisable to saw asbestos sheeting in a confined space. There is the case of a woman who for some six weeks intermittently held asbestos sheets which her husband cut to build a rabbit hutch and who 25 years later died of mesothelioma".

At the time of that correspondence production of

asbestos cement materials by this company was at record levels. So it continued almost to the 1980s. Throughout the country people were sawing, cutting, scraping the many asbestos products in many different types of industry and in their homes without any form of warning. No warning appeared on James Hardie product until at least October 1978. Australia now claims the highest rate of mesothelioma in the world.

In 2001 James Hardie sought to disassociate itself from what board papers described as "the legacy issues of its asbestos manufacturing history". There was some degree of urgency in the decision. A new accountancy disclosure regulation were likely to be promulgated later that year which would require disclosure of the provision of future asbestos liability in the company accounts. Investment and expansion of the company, particularly in the USA, such disclosure was seen as anathema. The company was desperate to cut itself loose of its asbestos liabilities and it had tried to do this and failed prior to 2001.

In preparation for the day that it could cut itself loose, the assets of James Hardie & Coy, a subsidiary company that manufactured and supplied asbestos in Australia had been sold off. In 1998 this company which had been the main operating arm of James Hardie in Australia had been the main operating arm for most of the 20th Century. Thus, in 2001 the Medical Research and Compensation Fund was established by James Hardie as a trust to be responsible for claims for asbestos injury that formally would have been made against the now non-operating James Hardie & Coy.

The company incorporated in the Netherlands was to become the principal company of the James Hardie Group. Removal from Australia upon court sanction of the proposed restructure is close to complete. What is noteworthy about the material and the board papers, at a meeting in February of 2001, was that the board assented to this course of conduct when there was no real recognition of what funding was needed to compensate in the years ahead.

What was appreciated was the principal challenge to the implementation of the proposed scheme would come if there was a public perception that the money being made available to the foundation was insufficient to meet future claims. Elaborate steps were proposed to avoid such perceptions being adopted yet nothing in the board papers - nothing - provided any satisfactory basis for identifying what the liabilities might be.

James Hardie in 1996 and 1998, 2000 and February 2001 had commissioned actuarial assessments of its asbestos liabilities. Extraordinarily, no member of the board had seen or read prior to the separation a copy of these reports which remained in draft. Any actuarial report is as good as the information provided. Lack of information provided by James Hardie and the performance of the actuaries was the subject of considerable criticism by the Commissioner after the inquiry established by the New South Wales government in 2005 to examine the establishment of the foundation.

In the 2000 Trowbridge report the asbestos liability placed the actuarial assessment at between $300 and $350 million dollars. This compared with the 1998 estimate of $234 million. The legal officer for James Hardie was

appalled that the number was so high. He instructed the claims officer for the company to stay close to Trowbridge and the actuary responsible and test the figures of this draft report.

The concern was to keep the numbers as low as possible to advance the prospect of restructure. Consistent with the pressure applied, the actuary subsequently informed Hardies that the figure would be reduced and liabilities were in the range of $300 to $310 million. Evidence at the inquiry revealed that the claims manager for James Hardie knew that the information being provided to the actuaries was inaccurate and understated the continuing cost of compensation. In fact, the legal officer for James Hardie asserted that he informed the incoming directors of the foundation in 2001 that there could be no guarantee in relation to funding and it may not be enough to cover all liabilities over the long haul.

Despite this, on 16 February 2001, following the board meeting authorising the separation, a press release was issued by James Hardie quoting its CEO Mr Peter McDonald as follows: "Establishment of the medical research compensation foundation provides certainty for people with legitimate claims against the former company. It will fund all future claims for compensation and support medical research. Effective today, the consolidated profit and loss statement of the James Hardie Group will not include costs associated with asbestos. From today, those costs will be borne by the new foundation".

The Court of Appeal in New South Wales confirmed the decision of the trial judge in the recent ASIC prosecution

against James Hardie who found that these statements were misleading and well they might have. The actual sum necessary to fund liabilities was closer to $1.5 billion, a big difference to the $293 million provided to the foundation. Thus, without going any further, one of the aspects I was going to speak to tonight was the manner in which the application proceeded by Justice Santo in the Supreme Court of New South Wales which regrettably I think does not do a great deal to put the legal profession in a good light.

That said, I have been extremely fortunate in my career to have a part in such interesting and fascinating cases and I must say it was a pleasure to be able to bring some of that together tonight.

DR FRENCH: Mr Rush has indicated that he is happy to take some questions, if anyone has a question Mike has got the microphone.

MS JOCKEL: Nothing like sticking my neck out. Maria Jockel from Russell Kennedy. Mr Rush, I was very challenged by what you had to say because insofar as the asbestos situation is concerned my take on that is basically individual and corporate negligence and a failure to heed the warnings of something that was clearly unsafe and could have been managed better if there had been a mind to do so.

That is a very different situation to the former situation that you spoke about which was the fires where yes, you've touched upon a whole range of factors which came together to compound the tragedy but ultimately - and there was a failure in terms of leadership but what came through to me was the fact that nature can be so

unpredictable and so fierce that regardless of our capacity to lead and communicate we can be caught unawares and that has been so prevalent in terms of the natural disasters that we have experienced more recently.

I am just wondering, given that you've had this perspective from this very diverse range of experiences, what are the lessons that you would think that we can best learn from, moving forward, and I am in particular interested in regard to the unpredictability of natural disasters.

MR RUSH: I accept what you say but I would say that flood and fire are different to earthquake and here on the Wednesday before 7 February the preparations in place, what was being distributed to firefighters in relation to the nature of the fire that they could expect, clearly indicated what was shown on this graph that this was a fire that could not be fought. The only thing that could be done was to ensure proper warning and we have - when we put our mind to it - fantastic ability to warn.

I think another element of some importance was that in the mid 1990s there was a change in the manner of thinking in relation to government that people should be more responsible for their own welfare in relation to the way they engaged with a day like 7 February and, thus, people may remember that in most communities, after the Ash Wednesday fire, what was established were refuges and there used to be signs on country roads where refuges were pointed to people who could at least go to a place of comparative safety and we know that at Gallipoli Park in Marysville many many people went to this place as a former refuge and survived the fire.

So, I think by that example what I am saying is that we need to be much better prepared and what I indirectly referred to was I think the warnings that we get and the warnings over the summer period are fairly ineffectual. If you go to the back of Rosebud and Rye and Sorrento or to Lorne where people live surrounded by trees there is no escape from fire.

Yet if we lived in California, people who lived in those areas or holidayed in those areas would once a year, they would practise a response to fire so they would know where to go; they would know the roads to take so that the roads aren't clogged up. Each individual community is given a lesson in geography: if they don't leave – which is of course the best way to go – but we know from research that over 70 per cent of people will not leave their homes on a Code Red day.

So, I think the response to fire has to be what do we do in answer to that? We tell people that we can't protect them but your best method of approach in the face of a fire like that is here – a refuge, a safer place, a Lorne main street, that's what we should be doing and until we get into a pattern of recognising natural disaster like this – and if you believe in climate change, those people tell us that it is going to be more frequent – then we need to understand that this is the approach that has to be taken.

It is against human nature just to leave for no reason. People will not leave until they know there is a potential threat and then if we practise and we're aware we can do so in a fashion that will minimise the sort of loss that we suffered on 7 February.

DR FRENCH: I might just ask you about the stay or go policy and what you think about it.

MR RUSH: I think, as the Commission report indicates, that the stay option and the impact of trying to fight a fire for individuals is enormous, not only the people that successfully defended their homes and they have a perfect right to, and some of those people who survived showed scars of their attempt the defence of their homes. Some people left after their homes had been burned down but as an option I think the stay option, as the promotions indicate, the stay option should be the last option on a day like 7 February.

But, as I said, the research since 7 February 2009 clearly indicates that over 70 per cent of people in high risk bushfire areas will not leave their home unless they get information of direct risk and I think that is human nature. So we have to understand that people will not leave until they are given notice.

We called an expert in disaster management from Harvard University who described the stay or go policy as not a policy. It is, in effect, someone's belief as to what would happen, it was not a policy and I think that's exactly what it is: we have to adopt policies that are practical and fit in with the way in which the community react. It was a sustained education campaign for ten years to try and get people to leave before fire broke out - the night before 7 February or the morning of 7 February before fire, it doesn't work, and I think we understand why.

DR FRENCH: I just wanted to invite Andrew Clements, legal member of our community to give the vote of thanks.

MR CLEMENTS: On behalf of the Committee of the Society, I would like to thank Mr Rush for a most informative and engaging presentation on fire and asbestos and as a token of the Committee's appreciation I would like to present Mr Rush with some wine.

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