

# **ANNEXURE S**

## **Draft Index and Notes for an Interim Scheme of Arrangement**



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### **A. Preliminary**

#### 1. Definitions

#### 2. Parties

2.1. Apart from scheme creditors, the parties to the scheme would include Amaca and Amaba (“the scheme companies”), the scheme manager, the scheme advisor and the scheme actuary.

2.2. Scheme creditors would be persons who have given notice of a claim for an asbestos-related injury caused by James Hardie products which has been admitted as a scheme liability by the scheme manager.

#### 3. Purpose

3.1. The purpose of the scheme would be to assist the scheme companies to manage their obligations to current and future claimants in the best interests of the claimants as a whole and to provide a procedure for the satisfaction of scheme liabilities as early as reasonably practicable.

### **B. The Scheme**

#### 4. Application.

4.1. The scheme would apply to all scheme liabilities. A scheme liability would be defined as a claim notified under the scheme and admitted as a scheme liability by the scheme manager. The scheme would require the scheme manager to admit judgment debts and settlement agreement amounts. It may also confer a discretion on the scheme manager to admit claims notified where there was no judgment or agreement.

#### 5. Bar to proceedings.

5.1. The scheme should operate as a bar to proceedings to enforce payment of a scheme liability (save to the extent that Amaca or Amaba has failed to make a payment due under the scheme).

## **C. Determination Of Scheme Liabilities**

### 6. Lodgement of Claims.

- 6.1. The scheme would provide a mechanism for the lodgement of claims.
- 6.2. In the case of a judgment debt or a settlement agreement, it would be sufficient for the claimant to give notice of the judgment or agreement and, subject to being satisfied as to its authenticity, the scheme manager would then be required to admit the relevant amount as a scheme liability.
- 6.3. The scheme could also make provision for the lodgement of a claim in the absence of a judgment debt or settlement agreement. There would need to be a prescribed form for such a claim which invited the provision of sufficient information to enable the scheme manager to form a view about the claim. The scheme manager would have a discretion to admit the claim but no obligation to do so. Claims in that category which were admitted would become scheme liabilities.
- 6.4. The scheme may also include a voluntary mechanism for early resolution of such claims, such as by independent arbitration. Claims which were not admitted and not successfully arbitrated would remain to be determined in accordance with current tort law.

## **D. Payments Under The Scheme**

### 7. Actuarial Assessment of Payment Rate

- 7.1. At the outset of the scheme and at 18-month intervals thereafter, the scheme actuary would:
  - 7.1.1. undertake a review of the asbestos-related liabilities of the scheme companies;
  - 7.1.2. determine the applicable estimate of those liabilities; and
  - 7.1.3. recommend a payment rate for scheme liabilities for the following 18-month period.
- 7.2. The assessment and recommended payment rate of the scheme actuary would be considered by the scheme committee which would then determine and announce the applicable payment rate in respect of scheme

liabilities admitted during the following 18-month period. It would be necessary for the payment rate to be well publicised so that litigants were aware, during the course of litigation, and particularly during settlement negotiations, of the rate at which their claim would be paid.

## 8. Payment of Scheme Liabilities

- 8.1. The scheme would provide for prompt payment of scheme liabilities at the applicable payment rate.
- 8.2. The scheme would also provide for an additional payment to a scheme creditor in the event that, in a subsequent scheme period, the scheme actuary determined that the rate for the previous period had been too low, or in the event of an injection of funds augmenting the fund for the previous period.

## **E. Office Holders**

### 9. Office Holders

- 9.1. There would be a scheme manager, a scheme advisor and a scheme actuary.
- 9.2. The scheme manager would be any individual duly qualified in the reasonable opinion of Amaca to discharge the functions of scheme manager under the scheme. The first scheme manager should be someone familiar with the present circumstances.
- 9.3. The scheme advisor would be a lawyer, an accountant or some other suitably qualified professional.
- 9.4. The scheme actuary would be a member of the Australian Institute of Actuaries. The first scheme actuary would be named.

### 10. Scheme Committee

- 10.1. There would be a scheme committee comprised of each of the office-holders, a member of the board of Amaca, a future claimants' representative, a present claimants' representative and a representative of the Attorney-General.

- 10.2. The Amaca member would not vote on issues of potential conflict with the interests of Amaca.
- 10.3. The primary function of the scheme committee would be to approve the payment rate recommended by the scheme actuary or to determine an alternative payment rate.
- 10.4. The scheme committee would be bound to have regard to specified material including the scheme actuary's assessment of future liabilities.
- 10.5. The scheme committee would be bound to act in the interests of claimants as a whole.
- 10.6. There would need to be a mechanism for the urgent resolution of any failure on the part of the committee to agree on the appropriate payment rate. The risk of failure to agree could be reduced by the inclusion in the scheme of a fairly simple formula for determining the rate.
- 10.7. Perhaps there would also need to be a mechanism for an application to be made to the court either by the committee itself, for approval of the committee's determination, or by nominated parties (such as the Attorney-General or creditors) for review of the committee's decision. However that mechanism should not be permitted to delay the payment of claims.