

The Wall

"Toxic torts" burgeon as CSR concedes

Back in the '70s, when Australia's eleventh largest company, CSR Ltd., faced the first of hundreds of claims by ex-employees that the Wittenoom asbestos mine in Western Australia had caused incurable lung diseases, company legal advisers and CSR's insurance company faced two choices.

One was to offer compensation. Potential victims could be traced and their doctors warned. Money could be spent on research to try to stop them dying. But it could have cost CSR—through its wholly-owned subsidiary Midalco Pty. Ltd., which ran the mine—perhaps \$35 million in compensation payments, the victims' solicitors now estimate. It also meant admitting that safety regulations to contain Wittenoom's deadly blue asbestos dust had been inadequate.

The other tactic open to the sugar and construction giant was some variant on a popular play in U.S. courtrooms. Lawyers call it the Wall of Flesh defense. Cigarette and other major companies facing the possibility of big payouts on negligence claims stack the courtroom with teams of high-powered lawyers to argue minute points of law and maneuver for expensive adjournments.

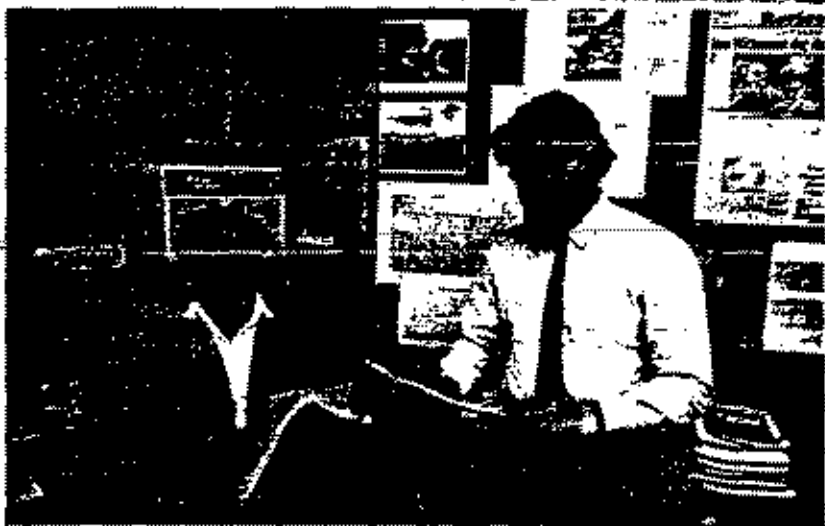
CSR records, secret until last week, show that its legal advisers, too, saw advantages for the company in denying all Wittenoom claims and fighting every case to the legal finish. On September 28, 1977, top Sydney law firm Freehill Hollingdale and Page told CSR that despite the ethical arguments "we are of the view that there are substantial legal barriers to be overcome by a claimant. Therefore, in the company's best interests any move outside the legal fortifications should only be undertaken after weighty deliberation." The company's insurers, the Perth-based State Government Insurance Commission (SGIC), added: "If we lose, we will be in no worse a position than if we decided to meet the claim."

In cold-blooded accounting and legal terms, there was no contest. Indeed, given shareholders' interests and CSR's vast financial and legal resources, lawyers would have been incompetent in suggesting any other tactic. Says Dr. Kathryn Cronin, a University of New South Wales law lecturer: "Legal ethics are that lawyers must fight as hard as they can in the interests of their client without doing anything

illegal. Lawyers do not see themselves as being in a position to give moral advice."

So, despite evidence from CSR's own files that mine executives knew as far back as the '40s that asbestos mining could trigger lung diseases, the company and its insurers for eleven years fought all claims from its dying former workers in six separate and hugely expensive supreme court cases in Victoria and Western Australia.

All the litigants, and the Perth-based Asbestos Diseases Association, which has campaigned for them, claim that poor safety conditions caused the lung diseases



Perth lawyer John Gordon with associate: "I felt it was immoral"

asbestosis and mesothelioma, a rare incurable tumor of the lung that can take 20 to 40 years to appear. Over these years many courtrooms saw the specter of hollow-eyed ex-miners—some sitting day after day in wheelchairs next to oxygen tanks.

Cornelius Maas was the first miner to sue. But he died from cancer before the case reached court. In 1980, Joan Joosten, 53, who contracted mesothelioma after working as a clerk at Wittenoom, died 30 minutes before her appeal against an adverse judgment was to be heard.

Throughout the '80s, CSR, the SGIC and the WA government, which was also being sued, defended doggedly. In the 10-month case fought by ex-Wittenoom workers Peter Heys and Tim Harrow—one of the longest civil actions in Australian

history—CSR hired eight barristers and solicitors, including two QCs, who had their own computer data bank. Barristers' fees and other costs ran to an estimated \$3 million on both sides. Peter Heys, 49, died from mesothelioma in April 1988, half way through the hearing. "CSR always claimed that it was concerned about 'pretenders,'" says Melbourne solicitor Peter Gordon, who ran many of the victims' cases. "The people proved they were not pretenders by promptly dying." Some of those involved had effectively predicted as much. A former safety officer at Wittenoom is quoted in another 1977 internal CSR document as commenting that "even if the workers die like flies, they will never be able to pin anything on CSR."

Until a rapid series of court decisions



The Wittenoom mine: a sinister historic relic

this year, CSR's defense held firm. In the first case, fought in 1977 in Perth, the judge held that there was insufficient proof that the worker's lung disease was attributable to negligent work practices at Wittenoom, and CSR went on to win two of the next five cases.

Then this year, ex-miner Colin Watson, 52, who is dying from asbestosis, was awarded nearly \$370,000 by the WA Supreme Court. Peter Heys and Tim Barrow together won more than \$371,000. And last month the Victorian Supreme Court upheld a jury verdict to award 52-year-old former Wittenoom worker Klaus Rabenalt \$250,000 in exemplary damages on top of a \$426,000 compensation payout because of industrial negligence.

It was the first time that punitive damages had been awarded in an Australian industrial negligence claim. Mr. Justice Kaye observed that a strong case had been made to support a finding of recklessness, "indeed of continuing, conscious and contumacious (humiliating) disregard by the defendant for the plaintiff's right to be free from risking injury or disease."

The Rabenalt case set a precedent and, faced with the inevitable, CSR managing director Ian Burgess decided to settle. By then, the company had spent an estimated \$20 million in legal fees on its defense. Burgess now says CSR's liability to the 288 ex-employees who are suing for compensation is likely to be \$50 million. This is

based on its insurer's estimates and includes all future claims. But a record \$200 million to \$400 million total compensation payout may be involved, according to some legal and market analysts. The final amount depends on how many of the 7,000 Wittenoom workers contract asbestosis or mesothelioma. Stephen Woodward, an anti-cancer activist and former University of

WA researcher, believes that more than 1,500 people could die. Says Woodward: "The rate will accelerate into the 1990s. The last deaths will not stop until the second or third decade of the next century."

While events have unfolded in boardrooms and courtrooms, the deserted mine itself has become a sinister historic relic. Wittenoom, which lies in the shadow of the Hamersley range, 1,600 kilometers north of Perth, was always a place of shreds and patches, with rundown housing commission bungalows. Once there was so much dust and fiber from the mine that Wittenoom's streets were literally paved with blue asbestos. During its years of operation from 1944 to 1966, an estimated 20,000 workers and their families helped to produce 6,000 tons of refined fiber a year.

Critics accuse the West Australian government and its Department of Mines of ignoring the dangers in their desire to see mineral development in the north at any price. For a time Wittenoom was seen as one of the great hopes of WA advancement. The ironic reality: the state now has the highest rate of mesothelioma of any region in the world.

The ending of one phase of the legal battle last week only served to trigger another. Burgess announced that CSR was also now taking to court its main insurer, the SGIC, whose managing director, Frank Mitchell, had argued that CSR and Midalco had failed to take reasonable safety precautions at Wittenoom and had therefore made their insurance cover "inoperative." CSR, in turn, announced that it was going to sue the SGIC for \$30 million. "I am certainly not going to let the SGIC walk away from their financial responsibility," Burgess snapped.

CSR's humiliation continued when confidential company files were broadcast on the Nine Network's program *Business Sunday*. They showed company executives, as well as the WA Mines Department, had long known that mining blue asbestos carried health risks.

The most damning 15-year-old memo referred to a warning given in 1948, four years after mining at Wittenoom began, by the local Royal Flying Doctor, Dr. Eric Saint. Saint, now a professor at the University of WA, recalls: "I wrote to the WA Commissioner of Health (in 1948). I said that it would probably be the biggest epidemic of asbestosis the world had ever known. That was on the record. Then I spoke to the local manager and told him that this was extremely dangerous. I said that almost certainly within a few years cases

of asbestosis would arise." As late as last month, CSR was specifically denying that it had been warned by Saint, or that the warning had been passed on. Yet an unsigned draft memo, dated June 12, 1974, and headed *Press Enquiry—Mesothelioma* confirmed that Saint had indeed given warnings about Wittenoom.

In another document, dated June 18, 1974, a CSR executive referred to an overseas trip as far back as 1945 from which "we were aware of some danger from the inhalation of asbestos fiber. Initially we understood this to be similar to silicosis but later heard of asbestosis and other related diseases." During court battles, CSR ran its entire defense on the basis that it did not know of the risk and could not have been reasonably expected to know in



CSR's Burgess: decided to settle

the circumstances. Documents reveal that its executives knew by 1977 that more and more of its workers could die of mesothelioma.

"I was outraged when I read the company documents," says Perth solicitor John Gordon, 29, who represented many of the Wittenoom workers. "I felt it was immoral for CSR to sit back and do nothing and let people die. And they were dying not knowing whether their families would be looked after."

In the 10-month Hey/Barrow case, CSR's QCs required the plaintiff to prove every minute point, prove every document and photograph. Says solicitor Peter Gordon, 31, in Melbourne: "At one stage, we wanted to put in a letter from an employee who is dead. They knew he was dead. We knew he was dead. But they would not allow the letter to go in until we proved that he was dead. That involved adjourning the case, looking for his widow, making application to the registrar for births, deaths and marriage, and then tendering the death certificate." But CSR's corporate relations chief Keith Roberts, says suggestions of delaying tactics are absurd. "In the Hey/Barrow case, we agreed to an expedited hearing which allowed the cases to jump the queue."

Perhaps partly as a result of Wittenoom, corporate negligence claims are on the increase in Australia. Judges, indeed, have complained that they are clogging up the courts. Lawyers have a joke phrase for them: "toxic torts," which covers claims ranging from the allegedly defective Dalkon Shield IUD contraceptive device to lung cancer said to have been induced by passive smoking.

To prevent this growing class of litigation from literally clogging the legal system, the Australian Law Reform Commission has proposed that Australia should adopt a system of class actions whereby one group of litigants can sue in a representative capacity, with the decision binding on all parties.

Class actions potentially reduce costs and time, the main problems with mass plaintiff litigation. They also stop corporations individualizing cases by producing damaging evidence of wayward behavior against a sole litigant and implying that the injury may have been aggravated or caused by that behavior. But business leaders strongly oppose class action legislation, fearing that it will set off a rash of frivolous claims.

They also object to the possibility of consumers who have not complained about a corporation's behavior being enjoined in a class action against that company. Says Clive Speed of the Business Council of Australia: "I have never seen Australian business and industry so united on an issue. The class action proposal has polarized business and consumers."

—By Christopher Browne



Greenwood: close to completing investigations of 16 cases

War Crimes Conflict

Liberals push for changes that Labor will not accept

While special investigator Robert Greenwood, QC, continues to travel the world in search of evidence against alleged Nazi war criminals living in Australia, there are growing doubts that the legislation to enable their prosecution in Australian courts will be passed in its present form.

After a Senate committee inquiry into the legislation in February, the Federal Government's War Crimes Amendments Bill was listed for consideration in the Senate in April, but debate has been delayed partly because of prolonged negotiations over opposition amendments to the bill. No agreement has been reached. The Government argues that the amendments are either unnecessary or would render prosecutions impossible.

The bill is now likely to be considered by the Senate on November 1 and it promises to be a lengthy and difficult debate. Some opposition senators, including Liberal David Hamer and the National Party's John Stone, have been strong critics of the legislation. Stone has expressed the fear that it would lead to show trials in which suspect Soviet-sourced evidence would be used. Other opposition politicians, like Liberal Senator Peter Baume, have made it clear they will support the legislation even if the opposition decides to oppose it.

Meanwhile, Greenwood and his team of investigators have spent more than \$1 million traveling to Israel, the United States, Europe and the Soviet Union gathering evidence for prosecutions. They are

said to be close to completing their investigations of 16 cases involving allegations of murder and mass murder. None of these cases will proceed unless the legislation is passed.

The opposition signaled its concern about the legislation when Greenwood's investigations were criticized last week by shadow attorney-general Neil Brown, who accused the investigators of interrogating three people without cautioning them. "It is contrary to all principles for government agents to act as if a bill that is before parliament has been passed into law," he said. Brown also criticized Prime Minister Bob Hawke who, on a television program, said that some of the crimes committed by people Greenwood was looking at were "quite horrendous." "The Prime Minister seemed to be prejudging cases before they had even gone to court," said Brown. "That's not acceptable." The exchange between Hawke and Brown was just a taste of the strong reactions the war crimes issue is likely to raise once the debate in the Senate gets under way.

The war crimes bill, which went through the House of Representatives last December, has already provoked strong reactions in some of Australia's ethnic communities, and politicians across the political spectrum have been subjected to sustained lobbying campaigns by representatives of the Baltic and Ukrainian communities. They want the legislation to be either dropped altogether or substantially modified so that all Soviet-sourced evidence is automatically excluded from