

Directors & Officers Alert

The importance of keeping accurate Minutes and the challenges of being General Counsel

ASIC and James Hardie – High Court Decision of 3 May 2012

The High Court has overturned the NSW Court of Appeal's decision in finding that seven non-executive Directors of James Hardie Industries Ltd (**JHIL**) had breached their duties to JHIL by approving the release of a misleading announcement to the ASX regarding the sufficiency of funds available to meet asbestos related claims made against JHIL.

In a significant win for ASIC the High Court held that despite some irregularity in JHIL minutes that the Board minutes were *"evidence of the truth of what they represented"* and that ASIC had proved its case by simply *"tendering the minutes"*.

This Judgment is a comprehensive rebuttal of the findings of the NSW Court of Appeal.

Brief background to the High Court Judgment

In 2001, the James Hardie Group underwent a restructure of its companies so that two of its subsidiaries with significant asbestos related liabilities were separated from the James Hardie Group of companies. A Medical Research and Compensation Foundation was established to fund claims made by people suffering injuries as a result of JHIL asbestos products.

To announce the separation, the JHIL Board approved an announcement to the Australian Stock Exchange (**ASX**) regarding the sufficiency of funds available to meet asbestos-related claims. It was well established that the announcement to the ASX was misleading.

Australian Securities and Investment Commission v MacDonald (No. 11) [2009] NSW SC 287

At first instance Justice Gzell of the NSW Supreme Court found that in the absence of any written evidence by the Directors that the draft press release was not tabled at JHIL's board meeting, he preferred the evidence of an objective witness to the board meeting that gave evidence that the draft press release had been approved in the *"usual way"* by the nodding of the Directors at the board meeting.

This was despite the Directors denying this occurred and two Directors giving evidence that they had not seen a copy of the draft press release and would not have voted for its publication, had they known its contents were misleading.

Morley and ORS v Australian Securities and Investment Commission [2010] NSW CA 331

The Directors of JHIL appealed the decision of Justice Gzell to the NSW Court of Appeal.

The NSW Court of Appeal found that even if the draft press release was discussed at the relevant Board meeting, it was not necessarily tabled, distributed and approved by the Board of JHIL.

The NSW Court of Appeal found that:-

“there was a sound basis for concluding that, in the unusual circumstances of “a last minute affair”, any distribution and discussion of a draft news release was to inform the board of the work in progress, as part of explaining the communication strategy, but with the ASX announcement to be finalised by management following consideration by the advisers.”

“The contraventions rested upon voting in favour of the Draft ASX Resolution. We have found that ASIC failed to prove its case in that respect. For that reason, the declarations of contravention cannot stand, and must be set aside.”

Australian Securities and Investment Commission v Hellicar [2012] HCA 17

ASIC appealed the Judgment of the NSW Court of Appeal to the High Court.

On appeal to the High Court, the respondent Directors argued that due to irregularities in the board minutes, the minutes could not be held to be a true reflection of what occurred during the Board meeting.

On 3 May 2012, the High Court held that the inaccuracies in the Board minutes did not counter their probative value as a contemporaneous record of what occurred during the board meeting during which the draft ASX announcement was approved.

The High Court relied on the board minutes, despite some irregularity and held that the board minutes were *“evidence of the truth of what they represented”*, and that ASIC had *“proved its case by tendering the minutes”*.

Consequently, the High Court overturned the Court of Appeal decision in finding that seven non-executive directors of JHIL had breached their duties as directors of the company by approving the release of a misleading announcement to the ASX regarding the sufficiency of funds available to meet asbestos-related claims made against JHIL.

The distinction between executive and non-executive directors was not a matter considered by the High Court. Executive and non-executive directors must continue to adhere to the same standards when performing their duties.

The respondent’s grounds of appeal concerning relief from liability and penalty have been remitted to the Court of Appeal for determination.

General Counsel Duties

Shafron v Australian Securities and Investment Commission [2012] HCA 18

In a separate, but connected judgment, the High Court also held that Mr Peter Shafron, JHIL’s Company Secretary and General Counsel breached his duties as an officer of the company, by failing to advise:

1. The Board, or the CEO, that JHIL should disclose certain information regarding JHIL’s separation from its subsidiaries; and
2. The Board that an actuarial study he had commissioned to predict asbestos-related liabilities had significant limitations.

The issue for determination by the High Court in the *Shafron* appeal was whether s. 180(1) of the *Corporations Act 2001 (Cth)* applied to Mr Shafron in respect of duties he carried out in his capacity as general counsel.

Section 180(1) proscribes that an ‘Officer’ of a company must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise in the circumstances. For the purposes of s. 180(1), Officers include:

1. Directors;
2. Secretaries; and
3. A person who makes, or participates in making decision that affects the whole or a substantial part of the business of a company.

The High Court held that Mr Shafron’s position in JHIL as Company Secretary and General Counsel was such that it was not possible to sever his responsibilities into two separate roles. The Court found that:

“It is not possible to sever Mr Shafron’s responsibilities into watertight compartments, one marked “Company Secretary” and the other marked “General Counsel”.”

The Court noted that the inquiry in relation to whether a particular person was an “Officer” required consideration of what role and responsibilities the person has in the company.

In Mr Shafron’s case, he was one of three company executives who had played a key role in formulating the proposals to the Board to separate JHIL’s subsidiaries that were exposed to asbestos liabilities from the rest of the JHIL group. In this regard, the High Court upheld the lower courts’ findings that, as an Officer, Mr Shafron had a duty to take care and employ diligence to protect the company from legal risk.

Mr Shafron’s grounds of appeal concerning penalties has been remitted to the Court of Appeal for determination.

More broadly, the Court commented that the extent to which General Counsel are subject to the duties imposed by s. 180(1) will be determined by the circumstances of the role in which they play in their company. If the roles are combined, depending on the circumstances, tasks conducted as General Counsel may well be indivisible from those of company secretary (as was found in Mr Shafron’s case) and the person in the role carries the obligations of a Company Secretary during the tasks they perform in their role as General Counsel.

What it means for you

If you are an Officer of a Corporation, you must exercise independent review and judgment in each and every significant decision that you make. It does not matter how competent advisors to the Board may be, a Director must decide matters on a personal basis and must exercise independent judgment.

You must ensure that the company always keeps and records accurate minutes and accounts of deliberations for decisions made within the company. Directors can no longer proceed on a consensus basis when it comes to making decisions. According to the High Court, there must be a proper recording of an actual decision. A company must put in place strict regulatory compliance around the recording and safe keeping of minutes and evidence showing the deliberations of Board members.

If you are in a role of Company Secretary and/or General Counsel you must be clear and be able to evidence what role you are undertaking with evidence supporting whether you’re supporting the Board in a Company Secretary role or advising the Board as an independent General Counsel.

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