

Briefing Note

'James Hardie' decision

The 'James Hardie' case is decided around specific sets of circumstances and facts. It was a highly emotive case, and is a timely reminder for companies to review how they proceed at board level.

Who does the decision affect?

The 'James Hardie' case brought into focus the roles of CEO, Company Secretary and General Counsel.

The definition of "Officers" extends beyond the ultimate decision-makers on the Board to include senior employees involved in the decision-making process, such as general counsel whose information directors usually rely upon. The decision affects directors and senior executives of a business, but can potentially affect senior managers who are involved in making decisions that affect part of a business.

Fiduciary duties

Additionally, Officers of a Corporation are subject to equitable fiduciary obligations.

Significantly, you do not need to be an Officer to be a fiduciary. Employees are also often fiduciaries, where they are relied on and entrusted with a special responsibility.

As a fiduciary, you have a duty of care and skill in carrying out your role. You also have a duty to act in your Corporation's best interests.

What does that mean?

Practically speaking, it means you have a never-ending obligation to act prudently, independently, objectively and sensibly in all decisions that you make affecting the business.

Directors should ensure that they have all information they need and in time before making decisions.

The case does not impose a duty on the board to review all management decisions.

If you do not act in accordance with your obligations you could be personally liable for fines and penalties including an order to compensate the company for any loss caused by a breach of one of your duties (which may not be covered by a responsive Directors' and Officers' policy). Individual Directors and Officers found to have breached their duties under the Corporations Act can be fined up to \$200,000 under s 1317G and/or banned from serving on company boards for "as long as the court thinks fit". They can also be ordered to compensate their company for any loss caused by their breach under s 1317H.

How broad is the Duty to consider content carefully?

The duty of care and diligence under section 180(1) of the Corporations Act requires you to consider content reasonably broadly. For every decision that affects the business, it is critical that you review information provided to you as prudently and as thoroughly as you can.

Section 180(1) sets out the duty of care and diligence as one that a reasonable person would exercise if they:

- > were a Director or Officer of a corporation in the corporation's circumstances; and
- > occupied the office held by, and had the same responsibilities within the corporation as, the Director or Officer.

While no doubt you are under time pressure, a Court will not accept that as an excuse where you failed to properly carry out your obligations.

If you are receiving information from other Officers, you should take the time to ensure

that you are satisfied with the information before you consider whether the instructions are correct and that any assumptions and reasoning is sound. If it is not, investigate why. Who else was consulted? Are they confident in their views and findings?

Don't assume that the information or the basis for calculations is always correct. Consider whether the figures before you have been independently verified. What are they based on? A best estimate is not the most reliable, as we saw in this case.

If in doubt, do not take a position on any information provided to you. Raise an objection or refrain from voting.

What level of due diligence is required for independent valuations?

This is a significant area of litigation as valuation evidence by its very nature is often wrong or able to be undone because of limited, false or inaccurate:

- > assumptions;
- > instructions;
- > information;
- > statements or documents; and
- > improper reliance on some matters over others.

Ensure that:

- > you are satisfied that each of the matters have been covered;
- > the basis for any assumptions is made clear; and
- > the instructions in respect of a valuation or independent expert advice are made



clear so you are aware of any limitations and can be satisfied that your knowledge of a matter is accurate and up-to-date.

You should seek clarification in writing from those Senior Executives to ensure this is documented so that you can at least produce your serious and methodical review of the material if called upon to justify a decision in the future.

It is obvious, but often not queried, that one valuation alone may not be a reliable foundation for any significant business decision.

Do all media releases now need to be approved by the Board?

Initially, you would say yes, particularly in the context of listed corporations.

Section 674(1) and (2) of the Corporations Act 2001, sections 1001(A)(1) and (2), 995(2), 999 and 1041(E)(1) are all relevant to this issue for listed corporations.

Essentially, those sections provide a positive obligation on a listed corporation to ensure that publicly released information is not likely to induce persons to take particular positions in respect of the shareholding of the business based on information that is false or materially misleading.

Since the James Hardie decision, many commentators have pondered whether all future press releases need to be vetted by a Board.

While there is no clear standpoint on the matter, we would suggest that it is prudent to ensure all market releases be properly reviewed by both management and the Board if the material may affect the value of the Corporation or important shareholder decisions.

The delegation of sign-off market statements to say, General Counsel, should be clear and practices monitored to ensure that media releases are accurate.

What should Minutes record?

Minutes should record the consideration of a Board for a significant decision and on request should note individual objections to decisions and on request again, the reasons for those objections.

In the James Hardie decision, Justice Gzell challenged the evidentiary value of Minutes signed two months after the particular meeting. In fact, he refused to consider them.

It is sometimes the case in Corporations that there is some delay in finalising Minutes. We strongly recommend you ensure that Minutes properly record the events of all board meetings and that they are prepared and signed by the Chairman well within the one-month deadline.

Tabling Documents

Consider protocols for the documents to be tabled at board meetings.

Preferably no documents should be tabled on the day of a meeting. If they are tabled then, depending on the purpose of being tabled, they should be read by the directors. If you are not at the meeting in person then you should get a copy of the materials which have been tabled or abstain from the decision.

Should Directors retain their own copy of board papers? Who owns board papers?

While not directly related to the decision, we touch on the need to keep board papers and deal with an often-asked question: who actually owns board papers?

- > An Officer of the Corporation can retain their board papers while an Officer of the Corporation and after they leave their position.
- > An Officer's board papers will often be held by the Corporation. An Officer is entitled to those board papers on request if legal proceedings are anticipated.

> The question of who ultimately owns board papers is still undecided in Australia. Presently, Officers can keep their board papers after they leave their Corporation and cannot be compelled to return them unless:

- there is an agreement in place between the Corporation and the individual Officers requiring their return;
- there is a real apprehension that the board papers will be misused to the detriment of the Corporation; or
- the Company needs them to assist in its own position.

It is worthwhile to note also that the obligations of confidentiality of board deliberation is on-going and permanent after expulsion or resignation.

Do Directors' & Officers' policies cover these breaches?

Corporations are prevented under section 199A(2) of the Corporations Act from taking out insurance covering their Officers from paying penalties under section 1317G or compensation orders under section 1317H of the Act. They cannot take out insurance to protect officers from "wilful breaches of their duties", either.

However, there is nothing to stop you from taking out a personal policy covering these breaches, such as statutory liability insurance. You should check your level of coverage and consider whether you need personal coverage as well.

Directors' and Officers' insurance covers many aspects of negligence for Senior Executives and Officers of Corporations. It is common practice for the company to provide each director with a Deed of Access and Indemnity granted in favour of the Director. The deed would often cover: access to documents and legal advice; indemnity of officers; and the provision of D&O insurance after you cease to be a Director.