

Lessons from James Hardie

At Cooper Grace Ward's Breakfast Brief on 28 July, the Honourable Justice Berna Collier from the Federal Court of Australia discussed the case in which the Australian Securities and Investments Commission sought civil penalties and other relief against seven non-executive directors, the chief executive officer, the company secretary/general counsel and the CFO of James Hardie Industries Limited (JHIL).

Case background

Set against the background of an exposure to significant asbestos-related disease claims, JHIL had restructured by taking its head office offshore and establishing a compensation foundation run by separate Australian companies which was intended to have been sufficiently funded to cover all claims essentially possible.

The draft ASX announcement of 15 February 2001, found by Justice Gzell of the Supreme Court of New South Wales to have been approved by the Board at its meeting on the same day, included statements for which there is no proper basis. This included statements that the foundation was fully funded, had sufficient funds for the asbestos claims and would provide certainty for people with legitimate asbestos claims.

The draft announcement was held to have been misleading.

Justice Gzell found that the draft announcement had been tabled at the Board Meeting notwithstanding a chorus of non-recollection by the five non-executive directors in Australia. Management gave evidence that the draft statement was tabled.

The Judge found that the company secretary/general counsel was an officer of the company, having a high level of participation in decision making. He was found to have breached section 180 of the Corporations Act in failing to obtain and provide advice to the Board about the need for disclosure.

The Judge found that the Chief Financial Officer was an officer of the company and was found to have breached section 180 of the Corporations Act on several occasions, including the draft ASX announcement and further announcements at press conferences.

The question of the penalties is currently before the Court. There has been considerable speculation as to whether there will be an appeal or appeals from the decision of Justice Gzell.

Justice Collier's Key Points for In-House Counsel and Company Secretaries

- **Minutes** Minutes should be carefully reviewed before adoption because of

the evidentiary weight they may hold. Timing of adoption of minutes is also critical in view of statutory evidentiary presumption.

- **Briefing Documents** Directors or officers who phone into a meeting from a remote location without proper briefing documents, including documents to be discussed at meeting, are at risk. Depending on circumstances it may be appropriate that they abstain from voting in relation to such documents.
- **Public Announcements** Directors must carefully review the wording of public announcements relating to important corporate events. Announcements are not merely PR exercises and as regards such announcements, directors are clearly subject to section 180(1) of the Corporations Act.
- **Definition of Officers in the Corporations Act** “Officers” for the purposes of section 180 may include persons involved in policy-making and decisions which affect the whole or a substantial part of the business of the corporation.
- **Responsibilities of Senior Officers** Senior officers of a company such as the CFO and the company secretary/general counsel are officers of the company for the purposes of section 180(1) and are expected to exercise a high level of care and diligence in advising the Board.
- **General Counsel's Responsibilities** The general counsel has a high degree of responsibility to protect the company from legal risk, and to ensure that the company abides by the law.

We again express our sincere thanks and appreciation to Justice Collier for her presentation and her insight into this case.

For those of you who missed our July Breakfast Brief, you are welcome to contact David Grace on T 61 7 3231 2432 or email david.grace@cgw.com.au for further information.

Cooper Grace Ward will also keep you informed of new developments with the James Hardie case as they arise via our [Legal Alerts](#).