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## Relief for James Hardie directors after painful lessons learned

### Introduction

The remnants of the High Court's decision in *Australian Securities and Investments Commission v Hellicar* [2012] ACA 17 might now be put to rest as a result of a decision handed down by the New South Wales Court of Appeal on 12 November 2012. The seven Directors involved in the *ASIC v Hellicar* decision plus the company secretary Peter Shafron appealed to the NSW Court of Appeal contesting the disqualification period which they received and additionally, the amount of the pecuniary penalty.

An outcome summary of their appeal is now given. Further to this, the Court of Appeal gave an unexpected ominous message to directors about the conduct of directors' meetings.

### *Australian Securities and Investments Commission v Hellicar*

By way of a background briefing, seven former non executive directors of James Hardie Industries Ltd (**James Hardie**) were named as defendants in proceedings brought by the Australian Securities and Investments Commission (**ASIC**) alleging the directors were in breach of Section 180 (1) of the *Corporations Act* 2001 (due care and diligence) as a result of the directors approving an ASX announcement at a James Hardie directors' meeting on 15 February 2011.

The ASX announcement unfortunately stated that an asbestos victims' foundation established by James Hardie held sufficient funds to meet anticipated future claims. This statement was found to be misleading as it failed to mention a number of important qualifications regarding the viability of the foundation.

As a consequence, the five Australian directors and the two USA directors were found to have contravened Section 180 (1) of the *Corporations Act* in failing to exercise due care and diligence. Each of the directors was disqualified from being a director for five years and each ordered to pay a pecuniary penalty of \$30,000. Against this background, the directors appealed against the severity of the disqualification period as well as the pecuniary penalty. The two USA directors sought relief from liability under Section 1317S(2) and 1318(1) of the *Corporations Act* having regard to the fact that they participated in the directors' meeting by telephone and neither had read the ASX announcement.

### What happened on appeal?

The Court of Appeal reviewed a number of past cases with similar issues involving the severity of penalties and examined the circumstances of how the draft ASX announcement was prepared and brought to the Board's attention. Character references were provided and submissions made about the effect of the disqualification orders on directors. The Australian directors were successful in having their disqualification period reduced from five years to two years and three months (with one director having a slightly shorter disqualification reprieve).

The situation of the USA directors was more challenging for the Court. The USA directors were in the unfortunate position of voting at the James Hardie directors' meeting in favour of the release of the ASX announcement (which seemingly was a consensus vote) without having a copy of the ASX announcement or being able to see it. Both of the USA directors were participating by telephone. The Court dismissed the application for relief from liability and found that the USA directors failed to concern themselves with the terms of a critically important document i.e. the ASX announcement to be released. The Court viewed this situation as paramount to the USA directors abdicating their responsibility at the meeting in a situation where they could have asked for a copy of the ASX announcement and abstained from voting on the resolution. That said, the disqualification orders preventing them from acting as directors were reduced to one year and eleven months. The USA directors also received a lesser pecuniary penalty of \$20,000 each whereas the Australian directors were ordered to pay a pecuniary penalty of \$25,000 each.

### Other lessons learned

If you are a public company director attending a directors' meeting and you are asked to vote on a matter on which you were not properly briefed (like the USA directors above) you should exercise one of these options:

- 1) Insist that you are fully briefed so that you can make a fully informed decision (as well as meet the other criteria in the business judgment rule in Section 180 of the *Corporations Act*); or
- 2) Ask for an adjournment of the meeting until the above applies or abstain from voting.



The presiding Judges in James Hardie Court of Appeal specifically mentioned that a directors' decision should be a reflection of consultation and consideration and individual members of the Board should form their own views on how to vote.

In the *ASIC v Hellicar* case, the USA directors participated in the 15 May Board meeting by way of telephone in a scenario where they were not competent to vote. Another lesson also emerges:

Where a directors' meeting is to be held where one or more of the directors is participating by telephone (see Section 248D of the Corporations Act), it is essential that all of the current directors in office who attend the meeting agree to the meeting being held in that manner. (This means that any change to the composition of the board activates the need to reconfirm directors' consents for this protocol). Regardless of how a directors' meeting is held and the technology utilised, each participating director must be able to see the document discussed during the course of the meeting. Each director must also be aware of the contributions to the meeting made by each of the other directors without significant impediment.

## Conclusion

The Court of Appeal's recent decision should now put an end to the James Hardie litigation on foot. Some will say that the reduction of the disqualification period for affected directors results in a "hollow victory" for the ASIC. However, the culpability of directors making ill-considered decisions is not affected by the case. The disqualification periods (albeit varied) will still remain a stain on each directors' record sheet which cannot be removed e.g. the disqualification orders cannot be expunged simply by way of effluxion of time when the disqualification period is no longer current. The presence of a simple error of judgment will obviously be a haunting and long lasting experience for the James Hardie directors involved.

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## Explorer's Guide to Queensland

The legal landscape facing explorers in Queensland is challenging. In the face of unprecedented public scrutiny, explorers are required to negotiate the various governing legislative regimes at the same time as they manage their relationships with impacted landholders and traditional owners, government regulators, employees, third party contractors and overlapping tenement holders.

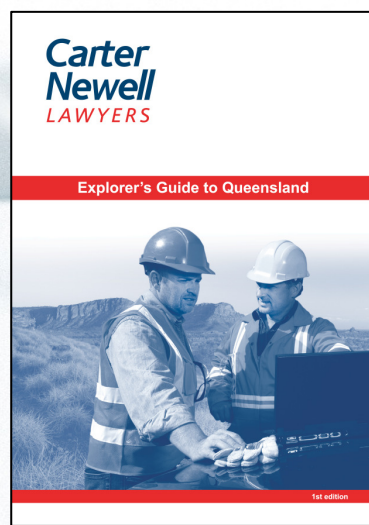
The inaugural edition of the Explorer's Guide to Queensland highlights key legal issues and challenges associated with exploration in Queensland.

The foreword for this edition has been provided by Mr Michael Roche, Chief Executive of the Queensland Recourses Council.

In his foreword, Mr Roche states *"in an ever-changing regulatory environment, this guide is a comprehensive and easy-to-understand overview of the key regulatory hurdles impacting Queensland exploration opportunities"*.

If you would like to receive a copy of this book, please request a hard copy via email to [newsletters@carternewell.com](mailto:newsletters@carternewell.com).

Alternatively, the guide is available as an ePublication on our website at [www.carternewell.com](http://www.carternewell.com).



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