

LEGAL & GOVERNANCE ISSUES FOR 2010

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1. Continuous disclosure
2. ASX Watch List – Director share trading
3. Changes in ASX Corporate Guidelines
4. Good faith negotiations
5. When is a director fit and proper?

CONTINUOUS DISCLOSURE – JAMES HARDIE

Did the Board approve the ASX Announcement?

- Non-executive directors “not disinterested” in having no recollection
- Copies of draft announcement held by attendees at the meeting
- Contents of the announcement discussed in communications strategy
- Lack of objection by directors
- Practice not to formally put matters to a resolution

CONTINUOUS DISCLOSURE – JAMES HARDIE

ASX Announcement

JHIL CEO Mr Peter Macdonald said that the establishment of a fully funded Foundation provided certainty for both claimants and shareholders.

“Its establishment has effectively resolved James Hardie’s asbestos liability.”

“James Hardie is satisfied that the Foundation has sufficient funds to meet anticipated future claims.”

CONTINUOUS DISCLOSURE – JAMES HARDIE

Issues with ASX Announcement

- ASIC impugned announcement rather than substantive decisions – need to treat announcements with same degree of care
- Statements were unequivocal and unqualified
- Review of cash flow models did not support statements
- Could not rely on advisers or management – emphatic nature of announcement at fault
- No more than an understanding of the English language

CONTINUOUS DISCLOSURE – JAMES HARDIE

Board Minute

ASX Announcement

The Chairman tabled an announcement to the ASX whereby the Company explains the effect of the resolutions passed at this meeting and the terms of the Foundation (ASX Announcement).

Resolved that:

- (a) The Company approved the ASX Announcement; and*
- (b) The ASX Announcement be executed by the Company and sent to the ASX.*

Timing - Board meeting 15 Feb 2001. Minutes recorded on 7 April 2001. Lost special evidentiary value under s251A.

Minimalist approach problematic.

CONTINUOUS DISCLOSURE – JAMES HARDIE

Business Judgement Rule (BJR)

- Judgement in good faith for proper purpose
- No material personal interest
- Informed about the subject matter to extent appropriate
- Rationally believe judgement is in best interests of company

One.Tel decision

BJR satisfied if belief rational – need not be reasonable

BUT

Not available if cannot point to a decision having been made

CONTINUOUS DISCLOSURE – JAMES HARDIE

Role of officers

A person who makes or participates in making decisions that affect the whole or substantial part of the business of the company

Same duties as directors

CFO

General Counsel/Company Secretary



Failed to advise Board of :

- limitations of cash flow model
- ASX announcement too emphatic

CONTINUOUS DISCLOSURE – FORTESCUE

“Framework Agreements”

- Fortescue believed to binding – relied on views of in-house lawyer
- ASIC claimed disclosures too emphatic, misleading & deceptive

Court held reasonable basis for the opinion. Note: Hardie were not statements of opinion but fact.

Allegations of dishonesty only be made where evidence to support them.

CONTINUOUS DISCLOSURE - IMPLICATIONS

James Hardie

- Establish review process for public announcements
- Timeliness of board minutes
- Beware minimalist board minutes
- Executives equally accountable

One.Tel

- Business Judgement Rule can assist
- Board minutes evidence of decisions made

Fortescue

- Obligation to advise if opinions are incorrect
- Maintain & review information provided to market

ASX ANNOUNCEMENTS – APPROVAL PROCESS

Price Sensitive –
Immediate
Release

Executive
approval (CEO –
CFO – Coy Sec)

Board approval
OR
Board Chairman
OR
Audit Chairman

Periodic Release
(eg financials)

Executive
approval (CEO –
CFO – Coy Sec)

Audit
Committee
AND
Board approval

Coy Sec Matters
(eg: Directors
Interests)

Executive
approval
(CEO/CFO – Coy
Sec)

Board noting

DIRECTOR SHARE TRADING

DISCLOSING DIRECTOR INTERESTS – LR 3.19A

| | |
|--|-------------|
| Interests of new director – within 5 days of appointment | Appendix 3X |
| Changes in director interest – within 5 days of change | Appendix 3Y |
| Interests of exiting director – within 5 days of exit | Appendix 3Z |

Notifiable Interest – power or control over voting rights or ability to dispose
eg: dependents, self funded superannuation funds

Company must:

- ensure directors aware of the obligations – eg specify in appointment letter
- enforce arrangements with directors

DIRECTOR SHARE TRADING

BLACKOUT PERIODS – period between close of company's financial period and announcement of results

Currently trading not prohibited.

ASX proposal:

- Require companies to have share trading policies – currently ASX Corporate Governance recommendation
- Policy to contain restrictions and clearance procedures
- Public disclosure of trading in a restricted period

DIRECTOR SHARE TRADING

INSIDER TRADING

Soust case – inflated company share price to obtain performance bonus

Practical suggestions

- Regularly monitor trades of executives & directors
- Put time limits on approvals
- Company secretary to be advised and record approvals
- Directors confirm no changes in holdings at each Board meeting

ASX CORPORATE GOVERNANCE GUIDELINES



GENDER DIVERSITY

- set policy with measureable targets
- disclose & report against – “if not why not”
- Nomination Committee charter to include review of proportion of women in company
- diversity to be included in criteria for Board performance review

Commencement 1 July 2010

ASX CORPORATE GOVERNANCE GUIDELINES

ANALYST BRIEFINGS

- retain summary of topics
- retain attendee list
- encourage web casts/ conference calls

REMUNERATION COMMITTEES

- 3+ members - majority independent
- independent chair
- need to report & Top 300 require compliance

RISK MANAGEMENT

ASX Guidelines –
http://www.asx.com.au/about/corporate_governance/index.htm

GOOD FAITH NEGOTIATIONS

UNITED GROUP RAIL SERVICES v RAIL CORPORATION

Issue_ – is obligation to undertake genuine and good faith negotiations binding

Decision - YES

- Agreement to negotiate is NOT agreement to agree
- Good faith requires honest and genuine attempt to resolve differences
- Not pretend to negotiate nor refuse to negotiate
- Not threaten further breach as settlement ploy

WHEN IS A DIRECTOR FIT & PROPER?

GARDENER v APRA

- HIH Director - former partner Arthur Andersen
- HIH Royal Commission – *“lack of attention to detail..lack of accountability..lack of integrity in internal processes...lack of sceptical questioning & analysis”*

Commentary for Directors

- Review actions at relevant time – not with benefit of hindsight
- Regard had to background, qualifications, knowledge, skill
- Important decisions presented on short notice reflect poorly on Board
- Best practice to exclude interested directors from decisions
- Blind reliance on auditors problematic
- Meeting with auditors no substitute for Audit Committee meetings
- Management to be excluded from auditor reviews

The background of the slide features a close-up, grayscale image of water ripples. The ripples are concentric circles of varying sizes, creating a textured, organic pattern that fills the lower two-thirds of the slide. The lighting is soft, highlighting the peaks and troughs of the water's surface.

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