

## What the James Hardie decision can teach all Directors

If you're a company director, the recent decision by the NSW Supreme Court in *ASIC v MacDonald*, should be enough to make you do a quick mental check of your actions over the last few years.

While much of the fall-out from the case concerns the emphatic nature of announcements made to the market, the clear message is that the role of a director is not a passive one. The fact that you do not remember seeing information circulated, or the staff of the company did not provide you with enough information to make an informed judgement, is not enough to protect you. It is your duty to ensure that you are fully informed and confident of the decisions taken by the Board.

*ASIC v MacDonald* was a landmark decision that demonstrates the extent of the obligations of executives when disclosing information to the Board and the market, and those of non-executive directors when making strategic decisions.

The James Hardie case arose from a restructure within the James Hardie group of companies that saw James Hardie Industries Limited (JHIL was then an ASX listed company) become a subsidiary of James Hardie Industries NV, a Netherlands company. JHIL was responsible for the Medical Research and Compensation Foundation, the fund established to manage the asbestos related personal injury claims faced by James Hardie as a result of the asbestos related products previously manufactured by the company. As one legal firm put it, the restructure "effectively severed" the MRCF from the remainder of the James Hardie Group.

On 16 February 2001, James Hardie released a final ASX announcement stating that a foundation had been formed to compensate sufferers of asbestos related diseases (who had claims against two former James Hardie subsidiaries) and to fund medical research aimed at finding cures for these diseases. Further, the statement claimed that "The Foundation has sufficient funds to meet all legitimate compensation claims anticipated..." and quoted the Managing Director, Peter MacDonald as saying "the establishment of a fully-funded Foundation provided certainty for both claimants and shareholders." Further, the statement added that James Hardie had sought the expert advice of a number of firms including PriceWaterhouseCoopers, Access Economics and the actuarial firm Trowbridge, adding "with this advice and supplementing the company's long experience in the area of asbestos, the directors of JHIL determined the level of funding required by the Foundation."

The Minutes of the Board meeting preceding the ASX announcement state that the directors had approved the draft announcement.

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## Top tax tips for business

June is your last chance to accelerate your tax deductions and boost your tax savings. Here are our top tax tips for business:

### Accelerate your deductions

- If you are a small business and want to claim the 50% Investment Allowance this year for a business investment you have made, you need to have the item installed ready for use in your business by 30 June.
- If cash flow allows, pay by 30 June for repairs, consumables such as office stationery, trade gifts, subscriptions and donations and claim the tax deduction this year. There are special rules for small businesses that give them access to higher immediate deductions for prepayments and depreciable assets so take advantage of what is available to you.
- Pay June quarter employee super contributions if you want to claim a tax deduction in the current year.
- Declare any **Directors' fees and bonuses** before June 30 and providing the company is absolutely committed to them, you are entitled to the deduction even if they have not been paid.

### Write off what you don't need

- Write off bad debts. If you've made every attempt to collect the money and failed, write it off in your debtor's ledger.
- Write off trading stock that is damaged or obsolete.
- Review your asset register and scrap any obsolete plant and equipment sitting on your depreciation schedule.

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## What the James Hardie decision can teach all Directors *continued*

ASIC launched action against seven former directors and three former company officers in February 2007 claiming, amongst other things that: "there were no reasonable grounds" for stating that there would be sufficient funds to meet all legitimate present and future asbestos claims brought against the former subsidiaries; and "JHIL had not received expert advice" from PwC or Access Economics to support the assertion that the amount of funds available in MRCF was enough to meet all legitimate present and future asbestos claims.

The Supreme Court upheld many of ASICs arguments. Specifically, the Court found that Mr MacDonald had breached his duty of care by failing to advise the Board that the draft ASX announcement was "expressed in too emphatic terms concerning the adequacy of the funding."

Mr MacDonald, Mr Morley (the Chief Financial Officer), and Mr Shafron (the Group Legal Council), were also found to have breached their duties by failing to advise the Board that "the review of the Cashflow Model by PwC and Access Economics was limited to reporting on logical soundness and technical correctness and they had been specifically instructed not to consider other key assumptions adopted by the Cashflow model."

Of interest to many non-executive directors was the finding that the non-executive directors had breached their duty of care by approving the draft ASX statement. While five of the non-executive directors chose to challenge the accuracy of the Board minutes which stated that the announcement had been approved, the judge did not accept the "chorus of non-recollection." Despite the fact that two of the non-executive directors were based in the United States and had not seen the draft announcement, they were still held to have breached their duties by not asking to see the announcement or abstaining from the vote.

One member of the board also argued that as he was not experienced in public relations, he was entitled to leave the decision on approval of public statements to those in a better position to decide its appropriateness. This argument was also rejected. The duties of a director are not split or weighted according to your area of expertise. Once management brought the draft ASX statement to the Board, the judge said that none of them was entitled to "abdicate responsibility by delegating his or her duty to a fellow director."

So, for those who have ever been guilty of not fully participating in Board meetings, not reading the materials provided prior to the meeting, signing off legal documents on behalf of the company without reading them thoroughly, not interrogating information provided them, or simply not reading the minutes and signing them

off anyway, the James Hardie case sends a strong message: ignorance is not bliss.

*Note: Since the court case, James Hardie has released a statement saying that within two years the assets of the Asbestos Injuries Compensation Fund (set up in 2007 in response to the underfunding of the original trust) "are likely to be insufficient to fund the payment of all reasonably foreseeable liabilities."*

## Top tax tips for business *continued*

### Manage the administration

- Help neutralise any capital gains you made during the year by realising any capital losses.
- Where you are operating a discretionary trust, the trustee should resolve how the income of the trust will be distributed and minute the decision.
- Where management fees are being charged between related entities, make sure that the charges have been raised by June 30.

*Call us for assistance on how to make the most of pre 30 June tax planning*

### Quote of the month

**"Well done is better than well said."**

**Benjamin Frank**