

AMPLA (WA) BREAKFAST SEMINAR JAMES HARDIE CASE

- the director's cut -



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	ISSUE ARISING	DIRECTOR'S PERSPECTIVE
1.	Judiciary's actual understanding of the workings of, and practical exposure to, board meetings of public listed entities	<ul style="list-style-type: none">• lack of appreciation as to how boards actually work in practice with risk of disparity between the court's view of legal duties of directors and accepted good governance practice

	ISSUE ARISING	DIRECTOR'S PERSPECTIVE
2.	Remote/technology enabled board attendance	<ul style="list-style-type: none">• liability risk will inhibit directors making the extra effort to attend meetings• that director will then be less informed of relevant issues having missed a meeting and be of less benefit to the corporation• companies will lose the benefit of the diversity of perspective and engagement by that director

	ISSUE ARISING	DIRECTOR'S PERSPECTIVE
3.	Restrictions on extent of reliance to be placed on fellow directors/executives/expert consultants	<p>Although it is accepted that directors should apply their own minds, especially on significant issues:</p> <ul style="list-style-type: none"> • there is, should and will always be a healthy degree of reliance on others (especially if others are more knowledgeable, experienced and skilled on that particular aspect) • risk of board efficiency being driven by the lowest common denominator principle • contrary to principles being promoted to encourage diversity and board renewal

	ISSUE ARISING	DIRECTOR'S PERSPECTIVE
4.	Board packs and ancillary papers should be comprehensive and be available well in advance of meetings for mature reflection and consideration	<ul style="list-style-type: none"> • board rooms and corporate endeavour are dynamic with some board papers only being available at the last minute: <ul style="list-style-type: none"> - of necessity - in the best interests of the company to do so • inherent to the role of a company director is that decisions need to be taken: <ul style="list-style-type: none"> - without all relevant information being available - within limited timeframes - without the benefit of 20/20 hindsight

	ISSUE ARISING	DIRECTOR'S PERSPECTIVE
5.	Directors should formally abstain/dissent on resolutions if they are not 100% satisfied as to everything	<ul style="list-style-type: none">• board decisions are usually made by “consensus” without formal vote• risk of dysfunctionality and tension if directors constantly abstained or dissented to seek to limit personal liability exposure• does someone who abstains necessarily discharge their duty?

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6.	ASX Announcements and continuous disclosure	<ul style="list-style-type: none"> • the dilemma posed by having to “immediately” disclose, yet the court saying significant ASX Announcements have to be first approved by the Board • the logistical dilemma in Boards having to meet “immediately” • the concept of ASX Announcements being “drafted in committee” by directors does not warrant mature reflection

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7.	Certainty around precise wording of the Board resolution being passed	<ul style="list-style-type: none"> • resolutions not always drafted in advance or passed in the precise wording originally tabled • chairman commonly summarises the substance of the resolution before it is “put” leaving it to company secretary/legal to perfect the technical wording • pedantic delays and “drafting in committee” risks if taken to extremes

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8.	Minutes of meeting	<ul style="list-style-type: none"> • good practice entails <ul style="list-style-type: none"> - drafted by company secretary - settled by chair - circulated for comment (within 7 days) - entered in corporate records (within 1 month) - formally approved at next meeting • danger in having directors maintain their own minutes and notes: <ul style="list-style-type: none"> - destroy(?) - iPads/laptop issues (?) • risk of meeting paralysis if there is a pedantic focus on minute “perfection” and checking

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9.	ASIC as a "model litigant" in civil proceedings	<ul style="list-style-type: none"> • still unclear in practice • increasing regulatory burden on directors for corporate failings <ul style="list-style-type: none"> - reversal of onus of proof - deemed liability unless a defence is proven otherwise - "criminality level" penalties even for civil offences (but with lower burden of proof) - limited "safe harbour defences" in practice (BJR, reasonable reliance, proper delegation) • differential treatment of director community compared with the balance of society

Conclusion

- no real new law
- salutary clarification of the high standards required of directors
- there is risk in the practical application of some of the JH principles
- tension in the balance between the law, judicial understanding, accepted “best governance practice” and overall societal outcomes