The landmark James Hardie Case in Australia: a wakeup call for non-executive directors

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Abstract
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Recent corporate failures in the developed world underscore the need for an active role of private actors such as directors in good governance of corporations.

A company in legal concept is an entity created by law conferring artificial personality to represent individuals who operate it for profits or other purposes with perpetuity in its existence and simplicity in its contractual relations. Corporations emerged as a division of society and gradually changed to an association of individuals: but at present a single person is sufficient to form a company. Corporations are now the driving force of national economies all over the world, where contemporary society is profoundly dependent on, and affected by, them in one way or another. Hence the regulation of corporations is ultimately part of social governance, and directors’ duties, investors' rights and their remedies have become the central concerns of corporate governance.

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The Landmark James Hardie Case in Australia: A Wakeup Call for Non-Executive Directors

S M Solaiman*

Introduction

Company directors are not an ornament, but they are an essential component of corporate governance,¹ and vigilant Non-Executive Directors (NEDs) are believed to be crucial to good governance of corporations.² Recent corporate failures in the developed world underscore the need for an active role of private actors such as directors in good governance of corporations.

A company in legal concept is an entity created by law conferring artificial personality to represent individuals who operate it for profits or other purposes with perpetuity in its existence and simplicity in its contractual relations.³ Corporations emerged as a division of society and gradually changed to an association of individuals,⁴ but presently a single person is sufficient to form a company.⁵ Corporations are now the driving force of national economies all over the world, where the contemporary society is profoundly dependent on, and affected by, them in one way or another. Hence the regulation of corporation is ultimately part of social governance, and directors’ duties, investors’ rights and their remedies have become the central concerns of corporate governance.⁶

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³ The terms ‘company’ and corporation are used interchangeably in this article.


⁵ For example, s113 of the Corporations Act 2001 (Cth) allows formation of one member proprietary companies.

The role of directors is most critical to corporate governance in that corporations are run by the Board of Directors (BODs) and the management as its delegate, where directors bear the responsibility of directing, controlling and monitoring the managerial functions. Their role is particularly important under the separation of ownership and control paradigm in which the latter is vested in directors.\footnote{Adolf A Berle Jr & Gardiner C Means, \textit{The Modern Corporations and Private Property} (1932) at 3-7.}

Given the importance of the role of directors, the scope, adequacy and proprietary of their duties and enforcement thereof are major concerns of corporate governance. Like many other countries, one of the basic statutory duties of directors and officers in Australia is the ‘duty of care and diligence’. The High Court of Australia in a landmark decision on 3 May 2012 upheld that seven NEDs of James Hardie Industries Limited (JHIL) have breached the statutory duty of care and diligence by approving a draft of public announcement containing misleading information about the sufficiency of the compensation fund for people injured by their asbestos products.\footnote{\textit{Australian Securities and Investments Commission v Macdonald} (No 11)\footnote{\textit{Peter James Sharon v Australian Securities and Investments Commission} [2012] HCA 18.} (Hardie case), in which all seven NEDs and three executives were penalised by the NSWSC. The trial Court found that the directors of JHIL at its board meeting on 15 February 2001 approved a draft containing misleading disclosures about the adequacy of compensation fund for asbestos victims without having to exercise their duty of care and diligence as required under s180(1) of the \textit{Corporations Act 2001} (Cth) (CA2001).\footnote{[2009] NSWSC 287.}}\footnote{\textit{James Hardie Industries Limited, Media Release: James Hardie Resolves Its Asbestos Liability Favourably for Claimants and Shareholders} (16 Feb 2001).} This guilty verdict in civil penalty proceedings was initially awarded by the Supreme Court of New South Wales (NSWSC) in 2009 in \textit{Australian Securities and Investments Commission v Macdonald} (No 11)\footnote{\textit{Peter James Sharon v Australian Securities and Investments Commission} [2012] HCA 18.} (Hardie case), in which all seven NEDs and three executives were penalised by the NSWSC. The trial Court found that the directors of JHIL at its board meeting on 15 February 2001 approved a draft containing misleading disclosures about the adequacy of compensation fund for asbestos victims without having to exercise their duty of care and diligence as required under s180(1) of the \textit{Corporations Act 2001} (Cth) (CA2001).\footnote{[2009] NSWSC 287.} All of them were penalised with bans from company directorship and fines in this civil penalty suit. The decision was appealed
to the Court of Appeal of NSW by all defendants except the CEO who appears to have accepted the verdict penalising him by the court of first instance.\textsuperscript{11} The NEDs won the appeal against their bans from company directorship and fines when the verdict was handed down on 17 December 2010 based on factual grounds. The appellate court found that the corporate regulator failed to prove any breach of duty of care by the NEDs, but affirmed breach by the executives who were partially successful in their appeal in a separate verdict delivered on 6 May 2011 reducing their penalties.\textsuperscript{12} The Court of Appeal had found unfairness in the regulator’s dealing with the case for not calling a crucial external legal advisor of the company, who was present at the board meeting in question.\textsuperscript{13} Australian Securities and Investments Commission (ASIC) appealed to the High Court which unanimously overturned the decision of the Court of Appeal and affirmed the guilty verdict of the trial court and remitted the matter to the Court of Appeal to decide outstanding matters, including penalties. The High Court has found as undisputed facts that the announcement was misleading, the minutes of the February 2001 meeting of the board recorded the approval of the disputed draft announcement, and the board at its April 2001 meeting approved the minutes as an accurate record of the previous meeting.\textsuperscript{14}

The \textit{Hardie case} puts unprecedented focus on the role of NEDs in approving management proposals involving vital and strategic issues of their company. ASIC termed the trial court verdict a landmark decision by arguing that it, for the first time, intensely emphasised the role of NEDs on the board in making corporate decisions, and provided guidance and directions on their liability for their failure to exercise due

\textsuperscript{11} \textit{Morley \& Ors v Australian Securities and Investments Commission} [2010] NSWCA 331.
\textsuperscript{12} \textit{Morley \& Ors v Australian Securities and Investments Commission} (No 2); Shafter v ASIC (No 2) [2011] NSWCA 110.
\textsuperscript{13} \textit{Morley \& Ors v Australian Securities and Investments Commission} [2010] NSWCA 331 at [794-796, 1156].
\textsuperscript{14} \textit{Australian Securities and Investments Commission \& Meredith Hellicar \& Ors} [2012] HCA 17 at [36].
care and diligence in performing their duties owed to the company.\textsuperscript{15} The trial Court broadly interpreted the contents and applications of directors’ and officers’ statutory duty of care and diligence under s180(1) of the CA2001 with respect to material disclosures to the public.

Typically, directors are appointed by shareholders to carry out business on behalf of the entity. Hence their role is representational which warrants accountability. This concept of accountability makes them subject to certain duties set out in their contracts with the company, common law, equity and statutory law. The \textit{Hardie} case is concerned with, amongst other things, the director’s duty of care and diligence which was initially imposed under equity as fiduciary duty and subsequently incorporated in the statute.\textsuperscript{16} They have been found to have breached this duty because of their failure to make themselves aware of the falsity in the material disclosure made by the company with their approval.

The decision has received mixed reactions from commentators. Some commentators argue that the decision goes too far to catch NEDs, and that such a decision may discourage competent people to take up directorship, which may have adverse impact upon corporate governance. This article argues that the \textit{Hardie} decisions do not extend the duty of care and diligence to NEDs, rather it is already embedded in the legislation, which is applicable to all directors regardless of their managerial responsibilities.


Corporate Governance and Non-Executive Directors

There is no single definition of corporate governance, it is a system comprised of both legal and ethical regulation of corporations aiming at ensuring accountability and transparency in the activities of entities and individuals behind the corporate veils. Richard Ells of Columbia Business School was perhaps the creator of this phrase, corporate governance, which was first used in 1962. However, the term governance owes its origins to the old French word called ‘gouvernance’ referring to control or a state of being controlled.

Corporate governance in a simplistic view intends to ensure return on investment. In a traditional sense, it simply means the effectiveness of legal mechanisms, which aim to prevent corporate managers from stealing other people’s money. The 1992 Cadbury Report (UK) defines corporate governance as being ‘the system by which companies are directed and controlled ... boards of directors are responsible for the governance of their companies’. Royal Commissioner Justice Owen in his final report on the collapse of HIH in Australia said that ‘...the expression “corporate governance” embraces not only the models or systems themselves but also the practices by which that exercise and control of authority is in fact effected’.

Corporate governance primarily aims to discipline the private actors who have assumed responsibility to run the company in order to advance the benefits of all

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stakeholders. The materialisation of these benefits requires imposition of certain duties, perhaps most important of which is the duty of care and diligence, on the actors behind the corporate veil. But the performance of duties is sometimes influenced by different competing interests, especially the conflict of interests between owners and managers of a company. This conflict is popularly known as an agency problem. This conflict may also be between the company and its other stakeholders such as creditors, consumers, employees and the society as whole. Thus the regulation of corporations has been increasingly a grave concern of the international community, and the recent global financial crisis has yet again reminded us of the terrible consequences of regulatory failure in corporate sector. Directors are responsible for the policy and strategic decisions of a company, whereas managers are obliged to implement those decisions. Corporations law generally empowers the board to make crucial decisions by active and informed participation of all its members. They form about 70 per cent of all directors on the boards of listed companies in Australia, therefore, their role in making corporate decisions is critical.

Non-Executive Directors

NEDs are those who assume directorship, but stand apart from the managerial responsibilities. They are thus sometimes called independent monitors of corporate activities. The Bank of England and Bank of Scotland used, probably for the first time, the term ‘director’ at the end of the 17th century, when the concept of joint stock company was put in place. Directors in practice are called in various names all depending on their respective roles in the governance of their company. These different names include managing directors, executive directors, NEDs, nominee directors, alternate director and so on. These descriptive names of directors are not

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used in the CA2001 in Australia, and their powers and functions are stated in the constitution of a given company.\textsuperscript{25} Unlike executive directors, NEDs are not employee of their company. They are appointed to provide expert views on particular areas of the company’s business. They are sometimes known as consultant.\textsuperscript{26}

Directors in general assume responsibility for the governance of their company in one way or another, and they often delegate part of their authority to the executives for practical purposes. The delegates are conferred the responsibility to conduct the business of the company, while the directors retain their authority to make policy decisions and provide directions to the executives to implement them. But the directors, despite their delegation of authority, remain accountable for wrongdoings committed by their delegates.

**Role of Non-Executive Directors in the Administration of Company Business**

Duties of directors initially drawn from the law of trust have gradually developed over a century through case law and statutes. Referring to this origin, Prof Adolf Berle describes corporations law as being substantially ‘a branch of the law of trusts’.\textsuperscript{27} Directors generally have dual roles to play in the administration of companies. They are: firstly, a trustee embracing common law duty of care, skill and diligence, and fiduciary duties to protect and promote the interest of the beneficiaries; and secondly, a dynamic entrepreneur assuming responsibility to take risk to increase the investment.\textsuperscript{28}

The role of NEDs in corporate governance has been emphasised in various reports in the UK such as The Cadbury Report 1992, The Hampel Report 1998 and

\textsuperscript{25} Jason Harris, *Corporations Law* (3\textsuperscript{rd} ed, 2010), Sydney: LexisNexis Butterworths at 98.
\textsuperscript{26} Michael Quilter, *The Company Law Notes* (3\textsuperscript{rd} ed, 2008) Sydney: LawBook Co at 70.
\textsuperscript{28} Ben Pettet, *Company Law* (2\textsuperscript{nd} ed, 2005) at 160.
The Higgs Report 2003. Their active role is critical from an agency theory perspective in that they can help reduce the conflict of interest between the managers and shareholders by providing an independent voice to the board meetings. The Cadbury Report suggests that independent NEDs should offer impartial views on crucial corporate issues such as strategy, performance, appointment and standard of corporate conduct. The Higgs Report describes NEDs as follows:

A non-executive director is considered independent when the board determines that the director is independent in character and judgment and there are no relationships or circumstances which could affect, or appear to affect, the director's judgment.

Following the recent corporate collapses in Australia and the United States, the HIH Royal Commission, the Ramsay Report, and the Corporate Law Economic Reform Program 9 (CLERP 9) in Australia placed a great emphasis on the enforcement of directors' duties. Most recently the Hardie case has reinforced the need for an active and informed role of directors especially the NEDs, and this view has been subsequently echoed in ASIC v Rich even though the ultimate findings in relation to the breach of directors' duties are different in these two recent cases. The Supreme Court of NSW in both cases underscores the need for NEDs to make themselves aware of the important strategic issues of the company, and play a proactive roles in the decision making process on such issues by the board.

In line with the agency theory of corporate governance, independent NEDs can play an effective role to control the conflict of interests between executives and shareholders, because NEDs are involved with the governance of the company, which

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30 Id at 69.
31 Ibid.
32 The Higgs Report 2003, UK at 37.
33 HIH Insurance, Ansett, One.Tel, Enron, WorldCom etc.
36 See ASIC v Macdonald (No. 11) [2009] NSWSC 287 at [255].
places them in a better position than shareholders to oversee the selfish pursuits by executives. Nolan suggests that NEDs be used to control the conflict of interests between executives and shareholders through properly reviewing the potentially conflicted transactions— to consider managerial disloyalty underlying the transactions and approve them only if they further the interest of the company. In other words, NEDs have the role of a gatekeeper. He recommends that their duties should not be limited to control ex ante, rather their role should be extended to enforce directors’ duty ex post by empowering them to prompt the company to bring legal action against the directors who breach their duties. In support of this active role of NEDs, the US experience suggests that companies with a strong contingent of NEDs perform much better than others. Consistently, research carried out by Morck, Shleifer, Vishny revealed that NEDs on the board can be effective for monitoring of the activities of executives, and they can even sometimes discipline the company management. Hence an active and informed role of NEDs is useful to protect the interest of corporate stakeholders against the vested interest of the executives. Moreover, recent failures of corporations in the developed world have diminished public confidence, which merits an effective control of conflicts of interest that must be manifestly seen to have been controlled.

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38 Id at 443
39 Ibid.
40 Ibid.
The above discussion of the roles of NEDs reveals that they have the important responsibility of protecting stakeholders. They should discharge their duties by taking an informed and active role on the board. Their failure to perform the statutory duty of care and diligence may harm not only the stakeholders, but also the company itself by eroding public confidence in its operations. In other words, the protection of the entity entails the protection of its stakeholders.\textsuperscript{45} Hence appropriate regulation is imperative to maximise sustainable benefits of corporations for all stakeholders.

\textbf{The Hardie Case and Non-Executive Directors}

\textbf{Facts in Brief}

Central to the fact of the case is disclosure of false and misleading statements in ‘too emphatic terms’ to the public for which ASIC lodged a civil penalty proceeding with the Supreme Court of New South Wales, Australia. The suit was filed against the original company named James Hardie Industries Limited (JHIL, changed to ABN 60 Pty Ltd in 2003), currently Netherland based company James Hardie Industries NV (JHNV), three former executive directors including the chief executive officer (CEO) company secretary & general counsel (CS & GC), and chief financial officer (CFO) and seven former NEDs. All executives and NEDs were sued under, amongst other statutory provisions, s180(1) of the Corporations Law\textsuperscript{46} as carried over into the s180(1) of the CA2001 containing the duty of care and diligence with respect to the preparation and approval of the defective disclosure.\textsuperscript{47} It may be mentioned that civil

\addcontentsline{toc}{section}{Notes}


\textsuperscript{46} Corporations Law has been replaced with the present \textit{Corporations Act 2001} (Cth) with effect from 15 July 2001.

\textsuperscript{47} JHIL (ABN 60 Pty Ltd) was prosecuted under ss 995(2), 999, 1001A (2) whilst JHI NV was sued under ss1041E, 1041H, 674(2) of the \textit{CA2001}. The allegations against the entities were misleading and deceptive conduct, false statements with respect to securities and breach of continuous disclosure provisions.
penalty is neither purely civil nor criminal but a hybrid of the two. Civil penalty was introduced in 1993 in Australia to redress the contraventions of corporate law, which are genuinely criminal in nature but the mens rea element could not be proved. These penalty provisions can be utilised by ASIC only where either criminal allegations cannot be proved or criminal sanctions are not available for a given contravention.\textsuperscript{48} 

JHIL was originally an importer of asbestos products and first started to manufacture them in 1916,\textsuperscript{49} whereas the danger of asbestos fibre was first detected in 1907.\textsuperscript{50} JHIL had been a manufacturer and seller of asbestos products in Australia until 1937. JHIL being the holding company had added two wholly owned subsidiaries named James Hardie & Coy Pty Ltd (Coy) and Jsekarb Pty Ltd (Jsekarb) to its group to manufacture and sell the same products for next 50 years since 1937 until they stopped manufacturing those harmful products in 1987.\textsuperscript{51} 

Asbestos building materials had been very popularly used in Australia in building about 33\% of dwelling houses especially from the 1950s to the early 1980s, and JHIL is the largest manufacturer of asbestos containing products used in asbestos cement sheet or ‘fibro’, insulation products, pipes and friction materials.\textsuperscript{52} Its production was legally banned in Australia in January 2004.\textsuperscript{53} 

\textsuperscript{50} Montague Murray, Commission on Compensation of Industrial Diseases 1907 as mentioned in Edwina Dunn, ‘James Hardie: No Soul to be Damned and No Body to be Kicked’ (2005) 27 Sydney Law Review 339 at 340.
\textsuperscript{52} ACTU, James Hardie Asbestos Victims Compensation Background Facts (Feb 2007) at 2.
\textsuperscript{53} Ibid.
Asbestos causes lung cancer which is currently incurable and the health problem becomes fatal within about a year of diagnosis. Jones, an employee of JHIL, made perhaps the first reported claim for compensation in Jones v James Hardie and Co Pty Ltd.\textsuperscript{54} The number of affected people has been on the rise since 1962.\textsuperscript{55} The total number of reported incidents rose to 7,515, and it is predicted that about 18,000 people will die from this disease called mesothelioma by 2020.\textsuperscript{56} The Australian Council of Trade Unions (ACTU) clarifies that the JHIL is not solely responsible for all these incidents, but it certainly contributes most to the total fatalities. A total of 12,515 (past and future) victims have been attributed to JHIL.\textsuperscript{57}

The increasing number of asbestos claims contributed to its disrepute in both its product and investment markets. Upon realisation of the damaging effect of its defective products, the company planned restructuring in 2001 in order to keep the trading entity away from asbestos related compensation claims. The board of JHIL in a meeting on 15 February 2001 decided to create a separate entity to deal with compensation claims on behalf of the James Hardie Group (JHIL and its wholly owned subsidiaries- Coy and Jsekarb). The new entity called Medical Research and Compensation Foundation (MRCF) was created and Medical Research Foundation Limited (MRCFL) was appointed as its trustee. The shares of JHIL in its subsidiaries Coy and Jsekarb were transferred to MRCFL to meet the present and future compensation claims.

This separation did not take place all of a sudden, because the management of JHIL proposed such a measure called “Project Green” at least 18 months prior to its

\textsuperscript{54} (1939) WCR (NSW) 129.
\textsuperscript{55} For details, see ACTU (2007) above n52.
\textsuperscript{56} James Leigh, Malignant Mesothelioma in Australia 1945-2002 as mentioned in ACTU (2007) above n52.
\textsuperscript{57} ACTU (2007) above n52.
implementation. At the 15 February 2001 meeting of the board of JHIL, it was also resolved that JHIL would enter into a Deed of Covenant & Indemnity (DOCI) with Coy and Jsekarb aiming at ensuring immunity from asbestos claims. The DOCI sought complete exemption for JHIL from asbestos related claims and the DOCI was entered into on the following day, 16 February 2001.

After this meeting of separation of JHIL and creation of MRCF - JHIL, in its attempt to regain public confidence, it made a misleading declaration through an ASX Announcement and Press Conference Statement on 16 February 2001 about the sufficiency of the newly created MRCF. The declaration contains that ‘The Foundation has sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL’. As found by the trial court judge but not proved in appeal, this announcement was approved by the Board without any material changes being made at its 15 February meeting in the presence of all of the defendants. But the announcement is proven to be false and misleading in that MRCF received only $293 million from JHIL, whereas the estimated total asbestos related claims exceeded 2.2 billion.

Interestingly, in continuation of its efforts to restructure and thereby separate JHIL from asbestos claims, the Board resolved to establish a new holding company to

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59 ASIC v Macdoland (No 11) [13], and for further detail see ‘James Hardie Case: Background’ (2009) ibid.
61 For the differences between the draft and final announcements, see ASIC v Macdoland (No. 11) [2009] 287 at [121]
be called James Hardie Industries NV (JHINV), apparently to exploit tax benefits.\textsuperscript{63} The Board approved a draft Information Memorandum at a meeting held on 23 July 2001 as part of a scheme of arrangements. The scheme was approved first by the court and subsequently by shareholders.\textsuperscript{64} Accordingly, JHINV was incorporated in Netherlands and JHIL became a wholly owned subsidiary of JHINV. In line with the scheme, JHIL issued 100,000 partly paid shares at $50 each to JHINV. The uncalled amount per share was $19,603, totalling $1.96 billion. The partly paid shares, as mentioned in the draft Memorandum approved by the Board, were meant to enable JHIL to call on JHINV if needed to satisfy any liabilities of JHIL.\textsuperscript{65} Justice Santow of the NSW Supreme Court showed his concern about JHIL’s ability to meet the compensation claims after the proposed transfer, and he was assured by the company that the compensation payment would not be affected by this shift due to JHIL’s ability to call on the partly paid shares.\textsuperscript{66} However, the Court was not informed that the directors of JHIL were notified by that time of the huge shortfall in MFCR funds.\textsuperscript{67} Subsequently, another trick to avoid liability was implemented by cancelling the aforementioned partly paid shares. Perhaps in reliance of s187 of the CA2001, those partly paid shares were cancelled for no consideration pursuant to a resolution of the Board of JHINV, which in effect reduced share capital of JHIL.\textsuperscript{68} This had been an issue in the \textit{Hardie case}, but a detailed discussion of this falls beyond the scope of this paper.

\textsuperscript{63} Ibid.
\textsuperscript{64} James Hardie Case: Background' (2009) above n58.
\textsuperscript{65} For details, see James Hardie Case: Background' (2009) above n58.
\textsuperscript{66} Edwina Dunn (2005) above n50 at 342.
\textsuperscript{67} Ibid.
\textsuperscript{68} For details, see James Hardie Case: Background' (2009) above n58.
Capitalising this separation, the CEO of JHIL, in a bid to attract foreign investment and boost up the company profile, repeatedly claimed in road show presentations overseas in 2002 that the MRCF was adequately funded to meet all asbestos claims. All these contributed to regaining the public confidence to some extent apparently at the expense of the compensation of the asbestos victims.

**Governmental Inquiry into the James Hardie Group Restructuring and Funding Shortfall**

Amid considerable public outrage against JHIL and trade union repercussions, the Government of NSW appointed a Special Commission of Inquiry headed by Mr David Jackson QC on 27 February 2004 to investigate the JHIL saga.

The investigation report released on 21 September 2004 revealed that the company’s asbestos liability would be between $1.5 and $2.4 billion, hence, it had significantly underfunded the trust called MRCF by about $2 billion.\(^6^9\) However, the restructuring efforts were found to be legal and the report suggested the existence of ‘significant deficiencies’ in corporate law in Australia.\(^7^0\) It added that:

\[\ldots\text{ its terms conveyed that the Foundation had been provided with sufficient funds to meet all legitimate future asbestos-related claims, and that accordingly there was “certainty” for persons who might suffer from such diseases and for JHIL shareholders. They also conveyed the impression that JHIL’s determination of the amount of funding needed for the Foundation had been checked by independent experts. In each of these respects they were seriously misleading.}\(^7^1\)

The Inquiry found that inaccuracies in various statements made by JHIL, but could not identify any breach of directors’ duties. Both the governments of NSW and Victoria expressed concerns about other companies which may adopt the same policy to avoid liability, hiding behind the corporate veil.\(^7^2\)

**Agreement between JHIL and the ACTU on Compensation Funding**

\(^{6^9}\) ACTU (2007) above p.52 at 3-4.
\(^{7^0}\) See for details, David Francis Jackson QC (2004) above n 49.
\(^{7^1}\) David Francis Jackson QC, above n49 at 10.
\(^{7^2}\) See, for detail, Edwina Dunn (2005) above n50.
Following significant pressures on JHIL from the state governments, federal government, employees unions and asbestos groups in NSW to negotiate a settlement of their liabilities for asbestos, the company eventually reached an agreement with unions and asbestos victim groups. The agreement was reached amongst James Hardie Group, the ACTU, Unions NSW, asbestos victim groups represented by Bernie Banton and the NSW Government on 21 December 2004. The agreement did not put any cap on the total amount of funding for the compensation or on payment to victims, and shareholders’ approval was needed for the agreement to be finalised. The approval was achieved at an extra-ordinary general meeting held on 7 February 2007 in the Netherlands with 99.6 per cent shareholders approving the package.73

The overwhelming support of the investors for the compensation does imply that investors themselves regard that the company has obligation to the society not to cause such serious harm.

Legal Action by ASIC against the Breach of the Corporations Act 2001 (Cth)

ASIC, as mentioned earlier, brought civil penalty proceedings against three executives, seven NEDs and the entities. Three executive directors are CEO, CS & GC and CFO of JHIL, namely Peter Macdonald, Peter Shafron and Phillip Morley. Phillip Morley was also a director of Coy and Jsekarb, subsidiaries of JHIL. Allegations against these executives relevant to this article were that they breached the statutory duty of care and diligence under s180(1) of the CA2001, failed to advise the Board about the use of ‘too emphatic’ terms in the Draft ASX Announcement as to the adequacy of funds, and failed to advise the Board of the limitations in expert

73 For details, see ACTU (2007) above n52 at 6-7.
reports about the adequacy of compensation funds.\textsuperscript{74} Seven NEDs defendants are: Mr Michael Brown, Mr Michael Gillfillan, Ms Meredith Hellicar, Mr Martin Koffel, Mr Geoffrey O’Brien, Mr Gregory Terry and Mr Peter Willcox. ASIC furnished allegations against all the NEDs that they breached their statutory duty of care and diligence under s180(1) in approving the Draft ASX Announcement and the Draft Information Memorandum concerning the creation of JNINV. The regulator commenced its legal proceedings on 15 February 2007.

ASIC claimed penalty up to $200,000 and disqualification orders against the directors and officers from managing corporations if the contraventions are proved on the balance of probabilities. In relation to proving the facts constituting such breaches of the statutory duties, the seriousness and gravity of the corporate conduct must be taken into account as held in \textit{Adler v Australian Securities and Investments Commission}.\textsuperscript{75} It may be mentioned that civil penalty is similar to a criminal fine but the former requires a lower standard of proof that being ‘on the balance of probability’ as opposed to the standard of ‘beyond reasonable doubt’ for criminal trials.\textsuperscript{76}

\textbf{Courts Findings on the Key Issues Against the Defendant Directors}

They all denied the allegations of contraventions brought against them. But ASIC was successful in proving most of its allegations, though not all. The breach of duty of care under s180(1) was proved against all of the three executives and seven NEDs. Despite the applications being lodged by the NEDs to be exonerated from penalty

\footnotesize{\textsuperscript{74} For a concise and clear description of proved and dismissed allegations, see ASIC, ‘\textit{ASIC v Peter Macdonald and Others Contraventions}’ http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/James-Hardie-table-of-findings.pdf/$file/James-Hardie-table-of-findings.pdf’ (visited 4 July 2011).

\textsuperscript{75} [2003] NSWCA 131 at [146-148].

\textsuperscript{76} Neil Andrews, ‘If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the Corporations Act and the Australian Securities and Investments Act’ (2003) 15 \textit{Australian Journal of Corporate Law} 137 at 150.}
under ss1317S(2) or 1318(1) which empower the court to exculpate any defendant at its discretion, Justice Gzell after having heard their submissions, handed down penalties against all of those 10 defendants on 20 August 2009 in ASIC v Macdonald and Others (NO 12). The CEO was fined $350,000 and disqualified for 15 years from managing a company for 11 contraventions, the CS & GC was ordered to pay a fine of $75,000 and barred from managing a company for 7 years for three contraventions, the CFO was fined only $35,000 and prevented from managing a company for 5 years for one contravention. Unlike the executives, the penalties of the NEDs were lighter because a fine of $30,000 was imposed on each of them disqualifying them to manage a company for five years for one contravention each, that is the failure to exercise due care and diligence in approving the Draft ASX Announcement at the board meeting of 15 February 2001 as found by the primary judge.

This paper is particularly concerned with NEDs. ASIC had two allegations of breach of s180(1) of the CA2001 against five and one allegation against two of the NEDs. Two allegations were laid against Michael Brown, Michael Gillfillan, Meredith Hellicar, Martin Koffel and Peter Willcox with respect to the approval of the Draft ASX Announcement at its meeting on 15 February 2001; and the approval of the Draft Information Memorandum regarding creation of JHINV at its meeting of 23 July 2001. ASIC laid one allegation against Geoffrey O’Brien and Gregory Terry with regard to the breach of duty of care and diligence in approving the Draft ASX Announcement at the 15 February 2001 meeting. But ASIC successfully proved before the Supreme Court the breach of this section against all NEDs in respect of the Draft ASX Announcement only, and failed to prove the other allegation against the NEDs.

As can be inferred from the amount of civil penalty fine, all NEDs had been held responsible equally even though two directors were not present at the meeting and they participated via telephone-link from the US. All defendants denied the contraventions of the law, and all appeared to defend the case. However, CFO was the only executive who gave evidence. Except for Geoffrey O’Brien and Gregory Terry, five other NEDs gave evidence.

**Proving the Case Against NEDs by ASIC**

As mentioned above each of the NEDs defended the allegations brought against them and denied that they had approved the disputed Draft ASX Announcement, they even contended that the announcement had not been tabled. But the trial court and the HCA found that the Draft Announcement was tabled, approved and accordingly recorded in the minutes which were subsequently approved at the board meeting as mentioned earlier.

There had been no objections being recorded in the resolutions regarding the approval of the Draft Announcement in question. Even neither of the directors who attended via telephone-link raised any objection to this approval. Hence, despite their physical absence, Justice Gzell found both of them in breach of their duty of care and diligence in that they did not familiarise themselves with the terms of the disputed Announcement, as a reasonable person in their position would have done. His Honour held that they breached s180(1) by failing to exercise their powers and carry out their duties with the necessary degree of care and diligence when approving the Draft ASX Announcement. This has been affirmed by the HCA.79

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79 *Australian Securities and Investments Commission v Meredith Hellicar & Ors* [2012] HCA 17.
Duty of Care and Diligence

Directors are responsible for the management and governance of their company. They are therefore subject to certain duties and liabilities. Director duties refer to a set of obligations arising out of, or incidental to, their actual or assumed position in the company they run and manage. The *Hardie case* applied the statutory duty as ASIC was the plaintiff. The statutory duty of care contained in s180(1) of the CA2001 is derived from the duty imposed under general law, comprising of common law and equity. ⁸⁰ The contents of the duty under both general law and statutory law are essentially the same, ⁸¹ even though the statute does not include the term ‘skill’ as included in the common law duty, rather it uses only ‘care and diligence’. ‘Skill’ refers to the competence of a director achieved through long term experience. ⁸² Technically, it seems reasonable to omit the term ‘skill’ from the statute in that the CA2001 does not require any long term experience to become a director of a company. ⁸³

Section 180(1) of the Act provides that:

> A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they: (a) were a director or officer of a corporation in the corporation’s circumstances; and (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

**Reasonable Care**

This care is clearly qualified by an objective standard. It does not mean all possible care must be taken by directors in exercising their powers and discharging their

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⁸³ See, for the eligibility of a director, §201 of the CA2001.
duties.\textsuperscript{94} The degree of care required to be taken by directors should be determined by reference to the care that would have been exercised by a reasonable person under the similar circumstances. The duty is owed to the company.\textsuperscript{85}

The determination of the appropriate degree of care and diligence attracts a number of concerns relevant to the company and its directors. The articulation of the above section does not provide any concrete description of the meaning and scope of the duty of care and diligence. The contents of this section are thus dependent upon the circumstances of the company concerned. As stated by the Court in \textit{ASIC v Macdonald}:

These circumstances include the type of company, the provisions of its constitution, the size and nature of the companies business, the composition of the board, the director's position and responsibilities within the company, the particular function the director is performing, the experience or skills of the particular director, the terms on which he or she has undertaken to act as a director, the manner in which responsibility for the business of the company is distributed between its directors and its employees, and the circumstances of the specific case [emphasis added].\textsuperscript{86}

The Court explains that a simple description of the "corporation's circumstances" refers to 'the competence of a company's management, the competence of the company's advisers and the distribution of responsibilities within the company, including those as between the directors and as between the directors and officers'. \textsuperscript{87}

Although the section explicitly requires application of the objective standard to measure the reasonableness of the disputed conduct of directors,\textsuperscript{88} the above description of the duty arguably reflects a requirement of a hybrid of subjective and objective tests to establish any breaches. This is because apart from the clear elements of the objective standard, at least 'the experience or skills of the particular director'

\textsuperscript{85} Id at 448.
\textsuperscript{86} \textit{ASIC v Macdonald} (No. 11) [2009] NSWSC 287 at [100] (citations omitted).
\textsuperscript{87} \textit{ASIC v Macdonald} (No. 11) [2009] NSWSC 287 at [240].
implies attribution of a subjective element to a reasonable person. This argument is reinforced by the pronouncement of the Court in ASC v Gallagher that it would suffice if a director can demonstrate the degree of skill in the performance of his/her duties that may be reasonably expected of a person having similar knowledge and experience. Further, the Court in Australian Securities and Investments Commission v Adler held about the determination of whether this duty has been exercised by a director, ‘one must ask what an ordinary person, with the knowledge and experience of the defendant might be expected to have done in the circumstances if he or she was acting on their own behalf’. It means that persons of higher skill and experience are reasonably expected to perform better. This interpretation sounds quite plausible in that a director need not be a scholar or experienced in his/her field as per the CA2001. Nonetheless, the directors have the responsibility to take reasonable steps to be able to direct and watch the management of their company.

The Supreme Court in the Hardie case has interpreted this duty in detail. First of all, directors owe their duty of care and diligence in discharging their responsibilities primarily to the company itself. The court in Vrisakis v ASC observes that resultant actual damage is not essential to constitute a breach of director’s duty of care and diligence, but a reasonable foreseen that his or her conduct may harm the company itself, its members and its creditors where the entity is in financial trouble, more importantly the risks must be weighed against potential rewards that can reasonably be expected to be achieved by the company. It means that directors are not always required to avoid a risk of harm in making their decision, rather they should aim for

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89 As mentioned in ASIC v Mcdonald (No. 11) [2009] NSWSC 287 at [101].
90 As mentioned in ASIC v Mcdonald (No. 11) [2009] NSWSC 287 at [239] (citations omitted).
92 Daniels v Anderson (1995) 16 ACSR 665 per Clarke and Sheller JJA. The court considered s232 of Corporations Law, which is the predecessor of s180 of the CA2001.
more benefit than harm and are required to exercise due care and diligence in making such decisions even though the decisions may not ultimately produce benefits to the company. 94

Regarding responsibilities of directors, the court gives emphasis to both the matter of delegation and manner of distribution. It observes that directors' or officers' 'responsibilities within the corporation' takes account of both matters of specific delegation of responsibilities and the manner in which the works are actually shared by directors and officers within the corporation and the 'expectations placed by those arrangements on the shoulders of the individual director or officer'. 95 The experience and skills of directors and officers and arrangements between themselves affecting the management of the company are to be taken into consideration with respect to such responsibilities. 96

The 'same responsibilities' is another phrase to be taken into account in relation to the breach of duty of care under s180(1)(b). It involves close consideration of the actual work assumed by the person concerned, and the whole position he or she occupies in the company. Also, dual roles being played by a particular officer, such as a director performing the role of the CEO, must be taken into account. 97

Another important issue with respect to the breach of this duty is reliance on others in performing duties by directors or officers. They are allowed to rely on experts unless the reliance is denied by certain facts known to them or ought to have

been known by the exercise of reasonable care. In the performance of all duties, directors and officers are allowed to rely on the judgment of, and information provided by, other officers or management without verification, however such reliance would be unreasonable if the director or officer was aware of the obvious circumstances that would prevent a person of any degree of prudence and acting on his/her behalf from relying on such other person. The exclusion clause was made even wider by the court on appeal that they cannot place such reliance on the basis that they will be protected based on negligence and failure to make inquiry about the truth. This view was derived from its original articulation in 1872 by Lord Hatherley LC in Overend & Gurney Co v Gibb. Clarke and Sheller JJA in Daniels (formerly practising as Deloitte Haskins & Sells) v Anderson observes that directors owe a duty of care to the company, and there has been no acceptable grounds to exclude them from this duty of exercising reasonable care in the performance of their responsibilities.

Hence it can be said that directors are required to exercise reasonable care and diligence in the performance of their office, and they can rely on information and advice provided by others where the circumstances do not deny that reliance, or in the case where a reasonable director would not put such reliance on others.

Perhaps the most talked about part of the Hardie case is the extent of duty of care and diligence of NEDs. The position of NEDs has never been clarified either in the legislation or in case law in Australia as to whether NEDs and their executive counterparts are to be treated equally or differentially in respect of duty of care and

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99 AWA Ltd v Daniels v/As Deloitte Haskins & Sells (1992) 7 ACSR 759 at 868.
101 (1872) LR 5HL 480 at 487.
diligence. Recognising director’s right to rely on the management of a company, Rogers CJ Comm Div in *AWA Ltd v Daniels t/as Deloitte Haskins & Sells*[^103] held the board need not be informed of every detail of the management of the company, but directors would be expected to be advised of ‘anything untoward or anything appropriate for consideration by the board’.[^104] His Honour also observed that:

> In contrast to the managing director, non-executive directors are not bound to give continuous attention to the affairs of the corporation. Their duties are of an intermittent nature to be performed at periodic board meetings, and at meetings of any committee of the board upon which the director happens to be placed.^[105]

This observation distinguishes between executive and non-executives with respect to continuous vigilance of corporate affairs, but the latter’s duty to attend meetings of the company seem obvious. Clarke and Sheller JJA in *Daniels* held on the role of NEDs that they are not required to get involved in the operation of the company, but they have to guide and monitor the management.[^106] Their Honours in *Daniels* held that:

> … [A] director, whatever his or her background, has a duty greater than that of simply representing a particular field of experience. That duty involves becoming familiar with the business of the company and how it is run and ensuring that the board has available means to audit the management of the company so that it can satisfy itself that the company is being properly run.^[107]

More precisely, the Supreme Court in NSW in the *Hardie case* observes that ‘the responsibilities of directors require that they take reasonable steps to place themselves in a position to guide and monitor the management of the company.’[^108]

Santow J of the NSWSC in *Adler* with regard to the responsibilities of directors, set out specific principles in relation to directors’ role. They are as follows:

[^103]: (1992) 7 ACSR 759 at 867.
[^104]: *AWA Ltd v Daniels t/as Deloitte Haskins & Sells* (1992) 7 ACSR 759 at 867 (AWA); ASIC v Macdonald (No. 11) [2009] NSWSC 287 at [252].
[^105]: *AWA Ltd v Daniels t/as Deloitte Haskins & Sells* (1992) 7 ACSR 759 at 867 - quoted from *ASIC v Macdonald* [2009] NSWSC 287 at [252].
[^108]: ASIC v Macdonald (No.11) [2009] NSWSC 287 at [255].
(a) a director should become familiar with the fundamentals of the business in which the corporation is engaged;
(b) a director is under a continuing obligation to keep informed about the activities of the corporation;
(c) directorial management requires a general monitoring of corporate affairs and policies, by way of regular attendance at board meetings; and
(d) a director should maintain familiarity with the financial status of the corporation by a regular review of financial statements.109

A literal difference between the common law duty and statutory duty is that the former include ‘skill’ in addition to the duty of care and diligence whereas the latter does not as alluded to earlier. However, this omission does not represent any significant difference between these two legal domains because judicial interpretations of the latter suggest that ‘the omission of “skill” does not diminish the nature and strictness of the obligation to act with care and diligence, nor does it remove issues of appropriate skill from consideration’.110 This omission by no means indicates that the requirement of skill is not needed, rather the judicial interpretation of skill has to be applied in addition to the statutory requirements of care and diligence.111 Directors’ skill would be measured objectively and they are not required to demonstrate greater skill than that of a reasonable person of the same knowledge and experience.112 Although a director is not required to bring special knowledge to the company, he/she is expected to use his/her knowledge in dealing with company affairs.113 NEDs in the Hardie case were found educated, experienced, knowledgeable and intelligent people,114 and the test for skills requires consideration of their knowledge and intelligence being compared to the reasonable bystander.

112 Austin & Ramsay (2010) id at 448, referred to Romer J.
113 Re Brazilian Rubber Plantations and Estates Limited [1911] 1 Ch 425.
114 See ASIC v Macdonald (No.11) [2009] NSWSC 287 at [305-337].
Regarding directors’ duty, Tadgell J in *Commonwealth Bank of Australia v Friedrich* pronounced that:

> [T]he stage has been reached when a director is expected to be capable of understanding his company’s affairs to the extent of actually reaching a reasonably informed opinion of its financial capacity .... I think it follows that he is required by law to be capable of keeping abreast of the company’s affairs, and sufficiently abreast of them to act appropriately if there are *reasonable grounds to expect that the company will not be able to pay all its debts in due course and he has reasonable cause to expect it* [emphasis added].

It not only imposes liability on directors, but also provides a defence to the liability that they did not have ‘reasonable cause to expect’ that the company would be unable to pay the debts. It clearly relies on the objective test and the court gave due consideration to the duty of care, skill and diligence in developing such an objective criteria. In relation to the application of this objective standard of skill, courts have concluded that directors have an obligation to make themselves aware of the financial affairs of the company ‘to the extent necessary to form each year the opinion of solvency required for the directors statement …, and they cannot avoid liability by claiming that they had never learned to read financial statements’. Directors’ obligation to make reasonable efforts in order to make themselves aware of the affairs of the company is also reflected in the judgment in *Re Australian Venezolana Pty Ltd.* The *Hardie case* has basically reinforced the judicial views expressed in the above judgement as all the three courts, the trial court, the Court of Appeal and the HCA, in the *Hardie case* rejected the claim of the two NEDs who attended the meeting from the USA via telephone link that they were not provided with a copy of the Draft and it was not read out, hence they did not approve it. The NEDs also added

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115 (1991) 5 ACSR 115 at 126.
116 Austin & Ramsay (2010) above n84 at 449.
118 (1962) 4 FLR 60 at 66.
that they would not have approved it had they known the terms of the Announcement, but the submission was rejected.\textsuperscript{119}

In sum, the \textit{Hardie case} has made it clear that the statutory duty of care and diligence requires all directors regardless of their executive responsibilities to make themselves informed of the affairs of the company, and play a proactive role in the decision-making by the Board. Ignorance of issues to be decided or passivity at the board meeting may not be an excuse for exoneration from liability that may arise from the decisions of the Board.

\textbf{Implications of the James Hardie Case for NEDs in Australia and Other Jurisdictions Having Similar Statutory Duty}

This case does provide a wake-up call for NEDs in that although they are not involved in the management, they are obliged to exercise due care and diligence in making resolutions at a board meeting. It provides a signal of ‘judicial intolerance, particularly when the board is engaged in a matter referred to it by management that requires personal attention and scrutiny.’\textsuperscript{120} Although the Court of Appeal overturned the decision of the trial judge in respect of the NEDs mainly based on ASIC’s failure to call the company’s solicitor as a witness,\textsuperscript{121} it had not affected the interpretation of duty of care and diligence provided by the primary judge. The HCA has not interpreted this duty in its appellate verdict. The following implications of this case for NEDs can be identified from the interpretations of the statutory duty of care and diligence by the trial court and the Court of Appeal as upheld by the HCA.

\textsuperscript{119} See \textit{Australian Securities and Investments Commission v Meredith Hellicar & Ors} [2012] HCA 17 [304-311]

\textsuperscript{120} Anil Hargovan, ‘Directors’ and Officers Dereliction of Duties and Disqualifications: An Analysis of James Hardie’ (2010) 31 \textit{The Company Lawyer} 29 at 36.

\textsuperscript{121} The Court of Appeal held that ASIC failed to exercise its ‘duty of fairness’ by its failure to call the companies solicitor Mr David Robb who had supervised the preparation of the Draft Announcement as a witness. Therefore ASIC failed to discharge its burden of proof in establishing the approval of the disputed draft announcement by the board at the meeting. The HCA did not find any unfairness’ in that failure. This issue is beyond the scope of this article. For details of the findings of the Court of Appeal and the HCA about this ‘duty of fairness’, see \textit{Australian Securities and Investments Commission v Meredith Hellicar & Ors} [2012] HCA 17 at [217-270].

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i. In the determination of liability for a breach of directors' statutory duty of care and diligence, all directors regardless of their involvement in the management will be judged based on their actual knowledge as well as what they ought to know about the subject matter of any impugned decisions of the Board.

ii. Any public disclosure like the 16 February 2001 ASX Announcement by JHIL should be regarded as a substantive matter of decision by the Board. All directors need to be sure that the relevant internal process has been properly followed in preparing any significant announcements to the public.

iii. Even if a director is not physically present at the meeting, it is equally important for him/her to receive the same information and materials relevant to the business of the meeting as his/her other colleagues would receive, or be satisfied that materials not received would not affect his/her informed judgement of the issues to be decided.

iv. Directors' passivity at the meeting should not be an excuse to be absolved from liability for the breach of duty of care. They should voice their objection if they have disagreement in approving a given proposal by the Board and request that their differing views with reasons be recorded in the formal minutes.

v. If directors are unable to gather sufficient information and relevant material required to make informed judgment on a particular matter, they should abstain from voting. This is because the ordinary and reasonable NED is to be instilled with the knowledge, skill and expertise of the particular director with respect to the determination of breach of the statutory duty of due care and a diligence.
vi. Resolutions of the board meetings should be recorded in the minutes book as required by s251 of the Act, and draft resolutions must be carefully read before giving them final approval in the following meeting.

This judgement arguably does not create any extension of the duty of care and diligence for NEDs. Instead it does, perhaps for the first time in Australia, clarify s180(1) of the Act with respect to the duties of NEDs. It does require all directors, especially the NEDs and passive directors, who may like to ‘go along’ with others regardless of their understanding of the subject-matter and consequences of the decisions they make at the board meeting be careful and conscientious.\textsuperscript{122} This decision is a warning for those who like to be less engaged in the board’s decision-making process by stating that they have the same duty of care and diligence as their more active colleagues who were physically present at the meeting.

The \textit{Hardie case} is the most significant step forward perhaps in that ASIC had, for the first time, successfully prosecuted NEDs for their failure to exercise due care and diligence in approving a disclosure statement by the board.\textsuperscript{123} Some commentators argue that the \textit{Hardie case} had overreached in making NEDs liable for their failure to make themselves aware of the serious inaccuracy in the contents of the false and misleading statement to the public. Their main arguments are perhaps that the NEDs are outsider, and they are not supposed to have knowledge of the internal affairs of the company unlike their executive counterparts. But none of the three courts involved in this trial and appeals have absolved them on that ground of less involvement in the company management. In our view, both the courts have taken simply a liberal approach to the interpretation of s180 of the Act containing the

\textsuperscript{122} Mentioned may be made here that ASIC had been successful in prosecuting NEDs under civil penalty provisions in several instances in which NEDs had paid out of their own pockets for different wrongdoings such as self-dealing; see, for details, Brian R Cheffins et al (2006) above n2.
statutory duty of care and diligence of directors and officers of companies in Australia, this may have implications for other jurisdictions which embrace similar provisions.

ASIC termed the guilty verdict of the trial judge, which remains the final verdict after appeals, as a landmark in the history of corporate governance of Australia as it provided important guidelines for corporate regulation. ASIC Chairman of the time observed that the ‘decision is another important step in improving corporate governance in Australia and that improvement will add confidence to the integrity of our markets.’ 124 The decision does clarify the scope and contents of duties of directors and officers for practical purposes when a matter is taken to the board with an intention to disclose it to the public. It puts great emphasis on the NEDs in relation to their duties in dealing with the proposals of management to approve statements for public disclosure as decisions of the Board.

Conclusions

Company directors have an important role to play in promoting and protecting comfort, safety and satisfaction of lives in our society in that we are all dependent upon products and services provided by corporations around the world. It is thus critical that the accountability of directors are ensured in order to facilitate maximisation of good and minimisation of harm that may be generated by corporations for us. The Hardie case seems to be a significant step towards that end. Arguably, it does not create any new duties as courts generally cannot impose additional responsibilities going beyond the scope of the relevant legislation while interpreting statutory duties. The importance of this case lies in the clarification of the

statutory duty of care and diligence of NEDs in Australia, which may be adopted by other countries with respect to their corporate regulation. An example of its recent application may be found in *ASIC v Healey*\(^{125}\) in which the Federal Court of Australia interpreted and applied, amongst other things, the duties of NEDs and s180 of the CA2001 in relation to civil penalties, and found directors of property giant Centro liable for signing off on faulty accounts in 2007 by breaching their corporate duties. Justice Middleton of the Federal Court in line with the Supreme Court of NSW, held that ‘[a] director is an essential component of corporate governance. Each director is placed at the apex of the structure of direction and management of a company’.\(^{126}\) His Honour observes that ‘The higher the office that is held by a person, the greater the responsibility that falls upon him or her. The role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and creditors’.\(^{127}\) Justice Middleton adds that ‘[a]l directors must carefully read and understand financial statements before they form the opinions’.\(^{128}\)

The judicial interpretation of s180(1) of the CA2001 affirms that the NEDs have a responsibility to conduct themselves reasonably in making decisions by boards, and that they should make themselves aware of the crucial subject matters they deal with at board meetings. Their passivity at the board meeting may constitute breach of their duty of care and diligence. They have the duty to save the company from potential harms be it pecuniary or reputational.\(^{129}\) Failure to do so will attract personal liability. There is ample evidence that personal liability works as incentives for proper

\(^{126}\) *ASIC v Healey* [2011] FCA 717 (27 June 2011) at [14].
\(^{127}\) *ASIC v Healey* [2011] FCA 717 (27 June 2011) at [14].
\(^{128}\) *ASIC v Healey* [2011] FCA 717 (27 June 2011) at [17].
\(^{129}\) *ASIC v Macdonald* (No 11) [2009] 287 at [259].
performance of corporate duties, and the *Hardie case* provides a reminder to all directors, regardless of their executive responsibilities, who believe in ‘going along’ with the rest of the crew without having to exercise due care and diligence in discharging their duties for which they are paid by the company.

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