

28 August 2009

## **GENERAL COUNSEL - INDEPENDENT ADVICE RECOMMENDED**

On 23 April 2009, the role of General Counsel changed forever. That was the day when Justice Gzell handed down his judgment in the long running James Hardie saga. On 20 August 2009, the Company's General Counsel was handed a 7 year disqualification and a \$75000 fine.

What was so different about these findings – and why do they impact so sharply on your role as General Counsel?

### **Officer**

Firstly, you are an "officer", and therefore all of the Corporations Act provisions about officers apply to you, including, most importantly, the duty of care and diligence. The Court wasted no time in holding that James Hardie's General Counsel, Peter Shafron, was an "officer".

As officers, General Counsel must come to grips with the commercial issues, apply their legal skills to these issues (and not just leave it to the Board to apply the law) and they must stand up and be counted!

### **Get the message through**

Secondly, as General Counsel, you need to have the courage of your convictions. Not only must you advise the chief executive officer, but you must be willing to go even further. If your message is not getting through to the CEO and you are not satisfied with his or her response to your advice, you must be prepared to take the next step and go directly to the Board. There is simply no room for you to be a shrinking violet. If you fail to take a robust position, it may be that you are protecting your relationship with your superior, but in doing so you may be risking the greater evil of failing to discharge your duty of care and diligence to the company that you serve.

### **Core duty**

Thirdly, the Court emphasised that General Counsel's core duty is to guard the company against legal risks. This obligation can only be carried out and discharged by real and meaningful action by you.

### **Come to grips with the real issues**

Fourthly, to effectively perform these duties, it is not enough to merely propound the law and to stand back. It involves a meaningful application of the law to the particular circumstances – and this means that you, as General Counsel must tackle the real issues (including financial issues which may be the domain of someone else, such as the CFO). In this particular case:

- Shafron had to form a view about the Company's ASX announcement, and if the announcement overstated the position, or was false or misleading, then he had to act by warning the directors that this was the case;



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- Shafron had to come to grips with the experts' reports, and in particular their limitations and qualifications, and not to simply allow the Board to rely on experts' reports which contained qualifications which negated their value. This is easier said than done. It requires courage to say – "Look here, this is not good enough – do not be lulled into a false sense of security" – this would have been the last thing that Shafron's gung ho superiors would have wanted to hear.

### **An independent attitude**

In the corporate hierarchy the position of General Counsel usually involves reporting to more senior executives. However, the role of General Counsel and the discharge of their duties can only be properly managed if you are willing to exercise an independent judgment and to speak out, even when doing so may be unpopular and may frustrate the wishes of your superiors and the Board. This may not be a comfortable position but it seems that job security and comfort are not the criteria by which the position of General Counsel can be judged or governed. Remember, the core duty is to protect the company against legal risks.

### **Independent advice**

Just as the chairman and other directors may have the right to obtain independent advice at the company's expense, it seems to me that there is good reason for General Counsel, who carry this heavy responsibility, to have the right, at the company's expense to obtain independent advice in situations where they are confronted by difficult issues and choices. This is particularly so where you may be faced with situations where you must proffer advice to your superiors which may be unwelcome or contrary to the very direction which they wish to pursue. This advice should not be sought from the company's regular legal advisers (who would have a potential conflict of interest). The advice should provide you, as General Counsel with an effective independent sounding board. The fundamentals of such advice are these:

- the advice must have a sound legal basis;
- the advice should come from an independent and disinterested source; and
- the adviser must be in a position to offer experience, balance and good business judgment

### **Mike Lyons**

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