

# James Hardie High Court Appeals – Implications for Company Secretaries and General Counsel



*Senior Associate, Simone Selkirk, considers the implications of the *Shafron v ASIC [2010] HCA 18* High Court decision handed down on 3 May 2012 as it effects Company Secretaries and General Counsel.*

*In particular reviewing the hazards of a blended role of General Counsel and Company Secretary and indivisibility of role capacities when discharging officer duties. This article identifies the key issues of awareness for Company Secretaries and General Counsel in managing their duties as officers and distinguishing their capacities in their dual role.*

The full bench of the High Court of Australia on 3 May 2012 overturned the NSW Court of Appeal Decisions in *Morley v Australian Securities and Investments Commission (No 2)* and *Shafron v Australian Securities and Investments Commission (No2)* holding that seven non-executive directors and the company secretary/general counsel of James Hardie Industries Ltd (JHIL) breached their duties as directors or officers of the company in relation to the release of a misleading announcement to the Australian Stock Exchange (ASX).

The two decisions provide a better understanding of ASIC's duties in bringing proceedings pursuant to the *Corporations Act 2001* (Cth) (*Corporations Act*). They are also, importantly, relevant to defining the duties held by non-executive directors, executive directors and management below board level, as well as clarifying the definition of "officer" under the *Corporations Act*.

## Background to original JHIL judgements

In 2007, ASIC brought civil penalty proceedings against seven former non-executive directors, three former executive directors and the company secretary/general counsel of JHIL for breaches of section 180(1) of the Act. It was alleged that each failed to exercise due care and diligence in relation to the release of information to the share market and, by doing so, breached their duties to the company in relation to announcements made by JHIL to the Australian Securities Exchange (ASX) to the effect that an asbestos compensation fund would be fully financed. It later emerged that the fund was underfunded by over \$1 billion. On appeal, one of the issues for the court was whether Mr Peter Shafron, the General Counsel and Company Secretary, was capable of falling under the scope of 'officer' as defined by section 9 of the *Corporations Act*.

The High Court found that Mr Shafron had failed to advise either the CEO or board of JHIL that the company should disclose to the stock exchange certain information contained in a Deed of Covenant and

Indemnity and for failing to advise the board that the actuarial study he had commissioned to predict asbestos-related liabilities suffered from critical limitations (which ultimately resulted in the foundation being underfunded by \$1.3bn). Mr Shafron had received the second highest penalty of the 10 defendants – a 7 year disqualification from acting as an officer of a company and a \$75,000 fine.

## High Court Appeal arguments

Mr Shafron argued before the High Court that the contraventions of s.180(1) of the *Corporations Act 2001* (breach of duties of care and diligence by an "officer" of a corporation) alleged against him related to his responsibilities as general counsel and not to his responsibilities as an "officer" of the company and he should therefore not be subject to section 180(1).

Mr Shafron did not dispute that s.180(1) applied to him in his capacity as company secretary but he maintained that the alleged contraventions of the section related to his actions solely in his capacity as general counsel and that accordingly the section should have no application to him in that capacity.

Mr Shafron asked the High Court to consider three questions:

1. In what respects did the statutory definition of “officer” apply to him?
2. Did he fail to exercise the relevant standard of care by failing to advise the CEO or the board that the DOCI information should be disclosed to the ASX?
3. Did he fail to exercise the relevant standard of care by failing to advise the board that the actuarial material did not take account of superimposed inflation but should have?

Mr Shafron argued that:

1. There should be a division of his duties and responsibilities between those undertaken in his capacity as a company secretary (and therefore officer) and those undertaken in his capacity as general counsel.
2. His duties as company secretary did not extend to giving advice of the kind alleged.
3. He was not an ‘officer’ of JHIL in any broader sense than as company secretary.

## High Court Findings

The High Court found that Mr Shafron’s responsibilities with JHIL as company secretary and general counsel were indivisible and must be viewed as a composite whole.

It was held that the scope of responsibilities of a particular officer should be determined by an examination of all the tasks performed for the company by the officer. The Court further found that the role of a particular company secretary cannot be deduced from an examination of the kinds of tasks that other company secretaries, whether at that company or in general, might perform.

## Who is an ‘Officer’ of a company?

The expression ‘officer’ is defined in section 9 of the Corporations Act, with sub-section 9(a) providing that:

*A director or secretary is an officer and section 9(b)(i) further defining an officer as a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation.*

Section 180(1) of the Corporations Act confers an obligation on the directors and officers of a company to exercise their responsibilities with care and diligence.

Mr Shafron argued that he was a mere provider of information and was not actually a participant in the relevant decision making processes. The High Court rejected this argument, pointing to Mr Shafron’s participation in the project team and his status as approver of ASX announcements as examples of being given authority such as finalising the terms of an agreement and negotiating, executing and underwriting agreements.

The test for participating in decision making was held to be more than an administrative arrangement, there must be a real contribution from the postulated participation to the making of the decisions, but beyond that it is a question of fact.

The High Court found that Mr Shafron was an officer of JHIL both by virtue of holding the office of company secretary, and because he participated in making significant decisions about JHIL’s business (and in particular, the decision to separate the entities with the asbestos liability from the rest of the James Hardie group).

The nature and extent of his participation was more than just providing the board with information and advice, but instead he had a large and active part in coming up with the proposal that he and others put to the JHIL board for approval.

The High Court held that a company secretary with legal background would be expected to raise issues such as potential misleading statements and disclosure obligations. Mr Shafron was also a senior executive employee of the company and was an active participant in the decision to adopt the separation proposal that he had helped to devise. Accordingly, a reasonable person with Mr Shafron’s responsibilities would have drawn to the attention of the board the particular matters of which he knew and that the board would have relied.

## Key issues of awareness for company Secretaries and General Counsel

The High Court's decision highlights significant corporate governance issues relating to the dual roles of company secretary and general counsel. The key points to note for Company Secretaries in dual roles as General Counsel include:

- Severability of company secretary and general counsel roles
  - » Any individual who is appointed to the dual role of company secretary and general counsel will be taken to be an "officer" under the Corporations Act, in respect of all their responsibilities, including their responsibilities as general counsel.
  - » It was held that it was not possible to sever the responsibilities of a company secretary and a dual role of general counsel into watertight compartments. The expression company secretary is not a term of art.
  - » It may be inferred that more often than not a company secretary's responsibilities are much more than merely administrative duties and that particularly in a combined role as a general counsel there is an extended duty to advise the board on substantive matters that a person in that role would be aware. Particularly if they were a part of the senior executive team of the company.

- » Additionally, it is not a defence to discharging the duty by claiming an entitlement to assume external legal advisors should have advised of disclosure obligations regarding certain information, particularly when an external legal advisor's retainer has neither expressly nor impliedly extended to considering that question. A note of caution that even where external advisors instructions are expanded to consider these wider issues, waiver of privilege over such instructions and advice will be a significant factor for consideration.
- Test for liability of an officer under the Corporations Act
  - » Pursuant to section 180(1) of the Corporations Act the measure of liability of an officer is measured by what a reasonable person would do if that person occupied the office of company secretary and, arising from the High Court findings, had the same responsibilities as those of Mr Shafron had in that office, namely that:
    - \* he was a senior executive of the company, was intimately involved in the development of the proposal submitted to the board; and
    - \* had access to advice relevant to company decisions in his general counsel role.

- » Accordingly, the finding of an 'officer' of a company involves an assessment of evaluating whether a person participates in making a decision, by considering the extent of the contribution by that person as a question of fact and the frequency or repetition of contributions over time.
- » A person is capable of participating in making a decision even if they are not the ultimate decision maker.
- » Any general counsel who plays a large and active part in formulating important proposals for the board may also be taken to be an "officer".

It is a note of caution for Company Secretaries in dual roles as General Counsel as any lack of due care and diligence on the part of such officers exposes those individuals to the risk of prosecution by the ASIC for contravention of the Corporations Act, which may result in disqualification and liability to pay pecuniary penalties, in addition to legal costs.

If you have any queries in relation to this article or how Piper Alderman can assist your company with its corporate governance and how the James Hardie High Court Appeal Judgements and the Shafron Judgement may impact on your company please do not hesitate to contact Simone Selkirk or a member of our Resources Senior Team.

*For further information contact:*

*Simone Selkirk, Senior Associate  
sselkirk@piperalderman.com.au*