

RULE OF LAW

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The James Hardie litigation – the broader implications

The Rule of Law Institute of Australia Inc welcomes the decision handed down today by the NSW Court of Appeal in the James Hardie litigation (*Morley & Ors v Australian Securities and Investments Commission* [2010] NSWCA 331).

The proceedings by ASIC against the directors of James Hardie were civil penalty proceedings not criminal proceedings. This has two important implications. Firstly ASIC only has to prove its case on the balance of probabilities and not beyond reasonable doubt. Secondly there was no obligation on ASIC of prosecutorial fairness. In criminal proceedings a prosecutor must ensure a trial of an accused is fair, always act in a detached manner and with the objective of establishing the whole truth. By bringing civil penalty proceedings, this obligation did not apply to ASIC.

The central premise of the argument against the non-executive directors of James Hardie was that they approved a crucial misleading ASX announcement at a directors meeting. That announcement stated that a fully-funded foundation had been set up to pay compensation to asbestos victims. The basis for the statements were actuarial reports which showed that in very limited circumstances the fund would be capable of paying the requisite compensation but if any slight change in circumstances occurred it would not cover the payments. The trial judge found the directors did discuss the announcement at the meeting and either did know or should have known it was misleading because it clearly stated the foundation was fully-funded when realistically the actuarial reports were not a reliable basis for the announcement. In reality the fund was underfunded by about one billion dollars.

The non-executive directors of James Hardie gave evidence that either they did not recall whether the ASX announcement was discussed at the meeting or they did not think it was. They gave evidence that they would not have approved the announcement had they discussed it. A lawyer who attended the meeting and may also been involved with the drafting of the announcement before the meeting was compelled by ASIC powers to give a statement to ASIC about the matter. The defendants had no power to require the lawyer to give the statement to them. ASIC did not

call the lawyer at trial and the defendants were denied the possible benefit of his evidence. The defendants had no way to compel the witnesses to speak to them before the trial and could not readily subpoena the lawyer as a witness at the trial whilst being unaware of what the lawyer might say in court.

Under the Australian Attorney-General's *Legal Services Directions* 2005, ASIC and other regulators are required to behave as a 'model litigant' when conducting litigation. A question arose for the judges to determine whether ASIC owed a duty of fairness and should have ensured the lawyer gave evidence.

Chief Justice Spigelman and Beazley & Giles JJA held that ASIC does not have a prosecutorial duty akin to that of criminal proceedings but it is not to be regarded as an ordinary civil litigant and it has a specific duty of fairness. Their Honours held that in the instant case, ASIC was obliged to call a witness of such central significance to critical issues that had arisen in the proceedings.

ASIC must now ensure that in any civil proceedings it conducts that the true facts are revealed. This has significant implications for ASIC and all other regulators conducting civil penalty litigation. It goes some of the way to balance the inequity between ASIC and other regulators' coercive fact-finding powers and the resources of individual litigants. For example, ASIC can compel a witness to appear at interview; obtain search warrants to conduct searches of premises; require a witness to turn over relevant documents; obtain a telecommunications warrant for phone-tapping of suspects; and require a witness to give all reasonable assistance. An ordinary litigant has none of these powers.

Under the rule of law, fairness in litigation is crucial. RoLIA applauds the new light that has been shone on a previously unclear area of regulators responsibilities.

For further information please contact RoLIA Researcher Lydia O'Keeffe on (02) 9251 8000.