

**Senate Economics Legislation Committee**  
**ANSWERS TO QUESTIONS ON NOTICE**

**Treasury Portfolio**

Additional Estimates 14 – 15 February 2007

**Question:**                    **aet126 (ASIC) - \*\*\***

**Topic:**                        **James Hardie – Payment of Legal Costs**

**Hansard Page:**            **E75 & E76**

**Senator WONG asked:**

The fact that Hardies is a Netherlands company may mean that they can, in effect, indemnify their officers in relation to these actions?

**Mr Cooper**—It may, but that is completely speculative. I do not know the answer to that.

**Senator WONG**—What about the payment of legal costs associated with defending these actions? Is that prohibited? If Hardies were registered in Australia, would this section prohibit them from paying legal costs for the defence of these actions for officers and past officers?

**Mr Cooper**—I will take that one on notice. I do not believe it would prevent it, but I think we should take that one on notice.

**Answer:**

In order to carry on business in Australia, James Hardies Industries NV must be, and is, registered under the *Corporations Act* as a foreign company. It is obliged to comply with the requirements of the *Corporations Act*, including s199A.

Under section 199A, a company is prohibited from indemnifying against a liability incurred as an officer of the company for a pecuniary penalty, and for legal costs incurred in unsuccessfully defending proceedings brought by ASIC seeking a court order (whether in relation to a pecuniary penalty or other order).

If the former officer is successful in defending the proceedings, the company may indemnify the officer against his or her legal costs incurred in the proceedings.

If the former officer is unsuccessful in defending the proceedings, the company is prohibited by s199A from indemnifying the officer against his or her legal costs incurred in the proceedings. If a company has entered into an indemnity agreement and made a payment, and an adverse order is subsequently made against the officer, the company has contravened s199A.

However, it may be open for a company to loan or advance money to the former officer for use in defending the proceedings with the stipulation that the money must be repaid in the event that the officer is unsuccessful in his or her defence. This possibility was raised in the Explanatory Memorandum in relation to amending the *Corporations Law* equivalent to s199A.

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**Senator WONG**—Senator Murray does make a good point, though. Would any current Australian law require disclosure of that fact, if the Netherlands company chose to provide such indemnity?

**Mr Cooper**—Certainly Australian companies disclose in their accounts whether directors are indemnified. In relation to a Netherlands company, we would have to take that on notice. The company has already made a market disclosure relating to the various indemnity relationships.

**Senator WONG**—The document you were reading off was the market disclosure?

**Mr D'Aloisio**—Yes, it was.

**Senator WONG**—Are you able to provide that to us?

**Mr D'Aloisio**—This was taken off the ASIC website. This is James Hardie.

**Senator WONG**—I would not mind having it tabled, if that is possible.

**Mr Cooper**—I will just make sure I have a full copy.

**Senator WONG**—Which entity made the disclosure?

**Mr Cooper**—The Netherlands entity, which is the listed entity, James Hardie International NV.

**Mr D'Aloisio**—It is the listed entity here, as it is a foreign company in Australia, with ASX. I think the thrust of what you are putting is something we will look at more closely. I think we understand what you want us to look at.

**Answer:**

A company included in the official list of the ASX and to which the ASX Listing Rules apply is a disclosing entity for the purposes of the Corporations Act, regardless of its domicile. James Hardie Investments NV is a disclosing entity.

A disclosing entity must prepare a directors' report for each financial year. A directors' report must include details of any indemnity given to an officer or former officer against a liability for a pecuniary penalty, and for legal costs incurred in unsuccessfully defending proceedings brought by ASIC seeking a court order (ss300(8) and (9)).

James Hardie Investments NV has included the required information in relation to indemnities provided to officers and former officers in each annual report it filed with ASIC since 30 June 2000.