

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 29, 30 & 31 May 2007

Question: bet 54 (ASIC)

Topic: Indemnity granted to James Hardie Officers

Hansard Page: E85

Senator WONG asked:

First, what information can you give us? Are you able to table a document that sets out the extent of the indemnity or that describes the indemnity?

Mr D'Aloisio—The best statement of it is in the group's March 2007 financial statements.

Senator WONG—I will have to go along to ASIC and buy them?

Mr D'Aloisio—I was going to suggest that we are happy to get extracts of that for you.

Senator WONG—I would appreciate that. What is the financial extent of the indemnity? Is there a limit?

Mr D'Aloisio—There is not an amount. I do not think they have disclosed the amount of the policy, but you would expect that would be normal practice. You would not disclose—

Senator WONG—No, they are two different things. There is the insurance—

Mr D'Aloisio—Yes.

Senator WONG—which is an insurance policy issue. Is there any limit on the indemnity that has been granted pursuant to—

Mr D'Aloisio—I am not aware of what the limit would be. I would expect there would be a limit. I am not aware of what that is. I will look into that further as well.

Senator WONG—Have you perused the insurance policy?

Mr D'Aloisio—We would not have access to that at this point. Whether we get access to that as part of a trial would be a matter that would be looked into, but we would not have access to that. I do not know if we have requested it. I can also inquire about that.

Senator WONG—That would be useful, if you could take that on notice.

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Answer:

Indemnity arrangements

ASIC believes it is aware of all, or substantially all, of the indemnity arrangements in place for the former directors and officers of James Hardie. These indemnities are described and/or referred to in:

- (i) Article 150.1 of the Constitution of James Hardie Industries Limited (***JHIL***) and Article 28 of the Articles of Association of James Hardie Industries NV (***JHINV***); and
- (ii) deeds of indemnity, some of which are governed by the laws of NSW and some by the laws of Nevada, United States.

The Constitution and Articles of JHIL and JHINV each state that the indemnities granted are limited to proceedings where the relevant individual acted in good faith and in the best interests of the company.

ASIC has obtained from JHIL and JHINV a copy of 24 different deeds of indemnity, which those companies were able to locate. For some of the former directors and officers there are multiple indemnities provided by different corporate entities at different points in time.

The indemnities are expressed as operating to indemnify the former directors and officers against all liabilities 'to the fullest extent allowed by applicable law'. The indemnities (as both provided for under the deeds and described in the Constitution) cover liabilities incurred by individual directors and officers at any time in their capacity as an officer of James Hardie or in any way in the discharge of his or her duties as a director or officer. There are limits to the operation of the indemnities, relevantly excluding liability (incurred as an officer) for compensation owed to the company, a pecuniary penalty or legal costs incurred in unsuccessfully defending ASIC's civil proceeding or criminal proceedings. This is in accordance with section 199A of the *Corporations Act*. Additionally, the indemnities do not cover the former officers and directors where there is a finding by a court that an act of any director or officer was committed in bad faith or was the result of active and deliberate dishonesty or wilful fraud or illegality.

The indemnities do not include any monetary limit. The monetary limit of such indemnities are, therefore, likely to be the extent to which JHIL or JHINV have the financial capacity to meet whatever obligation is required under the indemnities.

If ASIC is successful in the civil pecuniary penalty proceedings (or any criminal proceedings that it initiates), the indemnities will not operate. In such circumstances, the former directors and officers will have to meet their respective legal costs and, to the extent JHINV or JHIL have paid any part of the former directors and officers legal costs in the civil penalty proceedings pursuant to the indemnities, those companies will be entitled to seek reimbursement from those individuals. The former directors

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and officers will have to pay any pecuniary penalties ordered by the court. If ASIC is unsuccessful in its proceedings, the former directors and officers can rely upon the indemnities and they may also obtain a costs order against ASIC.

Insurance policies

ASIC does not have a copy of the relevant JHIL or JHINV directors and officers liability insurance policies. ASIC has requested production of all relevant director and officer insurance policies, but JHIL and JHINV asserted that production of the policies would breach the terms of the policies and possibly render them void. In these circumstances, ASIC has not pressed for production at this time, but has reserved its position in that regard.