

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates 29, 30 & 31 May 2007

Question: bet 55 (ASIC)

Topic: James Hardie – Level of Cover

Hansard Page: E85

Senator WONG asked:

My point is that you have come to a view that the indemnity would not, to paraphrase—and correct me if I am wrong—lessen the amount of moneys available to James Hardie litigants, to claimants, on the basis that even if successful the directors would have insurance to cover that amount; that is, the pool of money would not be reduced. Presumably, in order to come to that view, you would need to consider what indemnity was offered and what the policy stated?

Mr D’Aloisio—I did not do the work myself, but I would assume in coming to that conclusion we would have done some rough calculations on what we would expect the level of cover to be and what we would expect the costs to be.

Senator WONG—Who did that work?

Mr D’Aloisio—I do not know. Within ASIC we would have done that. I do not know.

Senator WONG—I always get nervous, frankly, when people in estimates speak in the hypothetical, ‘We would have done it.’

Mr D’Aloisio—Short of doing it myself.

Senator WONG—No, but obviously getting advice about whether it was done.

Mr D’Aloisio—I will look at it again. The key point we are getting to here is whether there is a feeling that the indemnities could operate in a way that could have some significant impact on the ability of the Netherlands company to continue to meet its obligations. We are very alive to that issue. We are alive to it also in respect of the actual indemnity claim that we ourselves are not pursuing. The advice I have had to date is that that should not be an issue, but I will look at it again and see if I can get some further details.

Senator WONG—If you could provide more information on notice, I would appreciate it.

Answer:

Based on the information available to ASIC, ASIC’s position is that it appears the James Hardie payments into the NSW compensation foundation should not currently be significantly impacted by the director and officer indemnities. To the extent it is able, ASIC continues to monitor this situation. However, ASIC is dependent on the

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various parties and/or the NSW Government alerting it to any developments in this regard.

In coming to its view expressed, ASIC has considered the following information:

- q the terms of those deeds of indemnity granted which are in ASIC's possession;
- q Article 150.1 of the JHIL Constitution;
- q Article 28 of the JHIL Articles of Association;
- q the James Hardie Group's 31 March 2007 Financial Statement;
- q discussions between representatives of ASIC and the NSW Government concerning the possible impact of the ASIC proceedings on the compensation funding; and
- q the terms of the Amended and Restated Final Funding Agreement (dated 21 November 2006).

ASIC does not have, and so has been unable to consider the terms of, the James Hardie directors and officers insurance policies.

The James Hardie Group's Financial Statement for the period ending 31 March 2007 states (at page F-26):

'The Company has entered into deeds of indemnity with certain of its directors and officers...To date, claims for payments of expenses incurred have been received from certain former directors and officers in relation to the ASIC investigation, and in relation to the examination of these persons by ASIC delegates, the amount of which is not significant. Now that proceedings have been brought against former directors and officers of the James Hardie Group, the Company is likely to incur further liabilities under these indemnities. Initially, the Company has obligations, or has offered, to advance funds in respect of defence costs and depending on the outcome of the proceedings, may be or become responsible for these and other amounts. Any obligations of the Company in this regard are expected to be substantially recovered through the Company's insurance'.

ASIC has no reason to question the veracity of these statements.

In February 2007, representatives of ASIC and the NSW Government had discussions concerning the ASIC civil penalty proceedings, including, relevantly, whether the case has or is likely to have a material effect on James Hardie's funding of the NSW Government compensation scheme for asbestos claimants. During those discussions, the NSW Government advised ASIC it believed the proceedings were unlikely to have such an effect. Subsequently, in March 2007, the NSW Government wrote to JHINV repeating this same view.

Both the NSW Government's view, as expressed to ASIC, and ASIC's own view is informed by the structuring of the NSW compensation scheme's funding. The scheme caps James Hardie's annual payment as a percentage of James Hardie's free cash flow; this cap has been initially set at 35%, to be reduced over time. This means that James Hardie can only be required to contribute to the NSW scheme up to 35% of its annual free cash flow in the preceding year to meet the claims in the current year of asbestos claimants. Accordingly, the annual amount paid pursuant to the indemnities,

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and not recovered pursuant to the relevant insurance policies, would need to be substantial to materially impact the annual pool of money available to asbestos victims.