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DIRECTORS' OBLIGATIONS

DAVID CALLAGHAN

The decision in *Shafron v Australian Securities and Investments Commission* [2012] HCA 18 handed down on 3 May 2012 dismissed an appeal from Peter James Shafron that he had breached s180(1) of the *Corporations Act 2001* (Cth) by failing to discharge his duties as an officer of James Hardie Industries Ltd (**JHIL**) with the degree of care and diligence that a reasonable person in his position would have exercised. Mr Shafron was employed as "General Counsel and Company Secretary" of JHIL.

Mr Shafron was held to have failed to advise the CEO and the board of JHIL that certain information was required to be disclosed to the ASX under the continuous disclosure rules that apply to publicly listed companies. Secondly, he also failed to advise the board that an actuary's report relied upon by the board to predict asbestos related liabilities was significantly limited in its scope.

Mr Shafron did not dispute that s180(1) applied to his capacity as Company Secretary, but submitted that it did not apply to his capacity as General Counsel of the Company and therefore the alleged breach was not within the scope of his duties as Company Secretary.

The High Court rejected this submission saying that his duties as General Counsel and Company Secretary were indivisible and the "scope" of his role as officer of JHIL was potentially wider than the purely administrative role of the other Company Secretary when looking at Mr Shafron's duties as a whole.

The High Court said:

As the title "General Counsel and Company Secretary" given to Mr Shafron indicates, he was qualified as a lawyer – he was admitted to practise law both in Australia and in California. An important element in Mr Shafron's responsibilities was his giving advice about and, where appropriate, taking steps necessary to ensure compliance with all relevant legal requirements, including those that applied to JHIL as a listed public company. The primary judge and the Court of Appeal described this aspect of Mr Shafron's responsibilities as a duty to protect the company "from legal risk". No doubt that included ensuring that purely administrative functions were performed like transmitting necessary material to the ASX and maintaining appropriate records of the board. But Mr Shafron's responsibilities did not end at that point. His responsibilities were wider than administrative, and extended to the provision of necessary advice.

In summary, the fact that roles undertaken within a company by the one person are not divisible may not be anything new, but it certainly places a greater burden on those with dual roles within a corporation to ensure they continue to wear both hats when performing their functions.

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ENTERPRISE BARGAINING UNDER THE FAIR WORK ACT

PAT MULLINS

The bargaining process under the *Fair Work Act 2009* (Cth) (**FW Act**) can be a difficult and onerous process. The FW Act establishes a set of clear obligations and rules about how the process and negotiations are to occur and the contents of the enterprise agreements.

An Enterprise Bargaining Agreement (**EBA**) is essentially a collective agreement between an employer and employees. Unions are automatically bargaining representatives for a proposed EBA if an employee is to be covered by the proposed EBA, is a member of that union and the union is entitled to represent the employee's industrial interests in respect of the work to be covered by the EBA.

The process to gain approval in Fair Work Australia for an EBA should not be taken lightly as any misstep may doom the prospective EBA and Fair Work Australia may be forced to reject any EBA approval.

Some issues that may need to be tackled are:

1. A trade union opposing the approval of the EBA even with concessions and undertakings given by the employer;
2. Opposition by a trade union even with employees validly voting in the majority for an EBA to be approved;
3. A party attempting to breach freedom of association provisions under the FW Act including discriminating against employees because they are (or are not) members of a trade union;
4. Parties in good faith bargaining negotiations not negotiating in good faith under s 228 of the FW Act;
5. The notice of representational rights are not being given to employees;
6. The EBA not being adequately explained to employees;
7. The complete proposed EBA not being given to employees to review and peruse;
8. No ballot being held to vote for or against the proposed EBA;
9. The manner of the ballot being inappropriate or/and preventing certain persons from voting in the ballot;
10. Fair Work Australia do not approving the EBA because it does not pass the better off overall test (**BOOT Test**); and
11. Other procedural steps set out in the FW Act not being followed by either party.

Any one of the issues may prove fatal to the application of an EBA.

If employers are considering seeking the approval of an EBA, we strongly suggest seeking in depth legal advice before undertaking any part of the EBA process.

IN THE SIGHTS OF THE ATO – THE HUNT CONTINUES

MARK MADSEN

Since the introduction of the director penalty notice (**DPN**) regime in 1993, there have been gradual changes to enhance the ability of the ATO to claw back from directors personally PAYG(W) tax debts of a company. That ability was strengthened in 2010 with the option of entering into a formal, repayment arrangement to avoid personal liability being removed.

Following those changes, a director could avoid personal liability if within 21 days he or she:

- caused payment to be made in respect of the unremitted tax;
- placed the company into voluntary administration;
- wound up the company.

More recently, in late June 2012, the ATO was provided with more ammunition:

- A DPN can now also be issued to a director's tax agent's address.
- Whereas previously directors could only be penalised for PAYG(W) amounts, they are now also liable for a company's unpaid superannuation guarantee charge. The ATO is entitled to estimate the amount of that charge if it does not have sufficient information to accurately assess it.
- Where PAYG(W) or superannuation remains unreported and unpaid for three months after its due date, the only way for a director to then discharge the liability is to cause payment to be made (what have become known as "lockdown provisions").
- If the debt is reported by the company (that is to say, within that three month period), then the current DPN rules will apply and placing the company into external administration will prevent enforcement against the director personally.
- New directors cannot become liable for a director penalty until 30 days after appointment or, in the case of the lockdown provisions, three months.

More recently, in late June 2012, the ATO was provided with more ammunition

- A major loophole exploited by directors has been closed. PAYG(W) credits were previously available to directors irrespective of whether the amount had been remitted to the ATO by the company. Directors and their associates can now be held liable for those through a PAYG(W) non-compliance tax. The definition of "associate" is expansive.

Directors should be aware these changes also apply to unpaid amounts as at 30 June 2012. If those unpaid amounts had also been unreported for 3 months, then the lockdown provisions apply immediately and personal liability can now only be avoided through payment.

DIGITAL RECORDING DEVICES IN THE WORKPLACE

JONATHAN MAMARIL

Clients have often asked whether digital recording devices such as tape recorders, iPods and iPhones can be used in the workplace to secretly record discussions. This may occur when an employee is secretly recording a performance management discussion or general discussions in the workplace.

In Queensland, the *Invasion of Privacy Act 1971* (Qld) (**the Act**) prohibits the general use of listening devices and can lead to criminal sanctions including significant penalties and imprisonment.

However, this does not apply where the person using the listening device is a party to the private conversation or it is genuinely an unintentional hearing of a private conversation that a person is having on a phone. In essence, there is nothing under the Act to prevent an employee using a listening device in a private conversation if they are a party to that private conversation.

The Act does, however, prevent an employee using a listening device to generally listen or record other people's conversations for no specific purpose.

In addition, a person is prohibited from communicating or publishing a private conversation that was recorded, however there are some exceptions to this if:

1. The private conversation had the express or implied consent of the other person/s in the conversation;
2. The recording was made in the course of legal proceedings; and
3. It is reasonably necessary in the public interest or in the performance of a duty of the person or for the protection of the lawful interests of that person.

Employers should be aware that there is no statutory obligation for the employee to obtain consent from the employer to record discussions if there is a reasonable belief that their lawful interests need to be protected.

However, one way of getting around this is to give a reasonable and lawful direction that the employee cease recording any conversations and make it clear to the employee that recording the conversation is inappropriate, especially in circumstances of performance management discussions. Employers should also consider the development of appropriate policies and procedures to deal with digital recording devices in the workplace.

ADVANCES IN CHILD PROTECTION IN QUEENSLAND SCHOOLS

AMBER NIPPERESS

In 2004 the Queensland government introduced obligations on school employees to report the sexual abuse of students by another employee of the school. This was the first statutory obligation ever placed on teachers (and other school employees) to report child sexual abuse.

Until this year, there has been little change to this statutory obligation. However, in an effort to further protect children from sexual abuse, the State government has passed amending legislation to increase reporting obligations in schools, both public and private. Consequently, the reporting obligation of school employees has significantly increased, with further amendments to commence in early 2013.

Prior to 9 July 2012, a school employee, who became aware of or reasonably suspected that a student had been sexually abused by another employee of the school, was required to provide a written report of the abuse to the Principal. However, amendments to the *Education (General Provisions) Act 2006* ("the Act") have broadened this reporting obligation. The Act now requires school employees to provide a written report to the Principal if they become aware of, or reasonable suspect, that a student has been sexually abused by *any* person (including family and friends), as opposed to sexual abuse by a school employee only.

The amendments also require the Principal to provide a copy of the written report to the police, whereas under the old provisions, the Principal was only obliged to provide a copy to the Department, who would then provide the report to the police.

The reporting obligations are set to increase further in early 2013 when an obligation to report any *likely* sexual abuse of a student by any person will commence.

These amendments will bring the Queensland legislation into step with the reporting obligations in other States and Territories and will place school employees in a better position to assist students who are experiencing sexual abuse outside of school.

Schools should review their student protection policies to ensure that they comply with these amendments and ensure that staff are properly trained to enable them to meet their statutory obligations.

I THINK **I AM GOING MAD**

ANDREW NICHOLSON

I think I'm going mad. Not that it's my fault. I am developing SMS (Social Media Syndrome)* a condition which seems to be impossible to escape. Not that I have an affliction myself, but I am very concerned for others who do. People who are otherwise apparently sensible are apparently being consumed by this phenomenon.

Even our best and brightest are not immune. Our Olympians recently found their affliction with the condition to be non-performance enhancing and I have concerns for the wellbeing of a host of other sports stars and celebrities. Relevantly, those sports stars and celebrities are now being encouraged by large corporate organisations and their marketing agencies to use social media accounts, sometimes subliminally, in the promotion of their products – who would have thought that marketing agencies would use such tactics.

It is little wonder that the practice is developing. Kim Kardashian reportedly has 15 million twitter followers. That amounts to a significant audience and the communication to it is instantaneous.

The practice is becoming a legal issue because a number of celebrities have been accused of using their social media accounts for marketing purposes contrary to the terms of use or code of practice. In June English football star Wayne Rooney twittered (I know the correct term is tweet, but I think twit is more appropriate) "my resolution – to start the year as a champion and to finish it as a champion... #makeitcountgonike.me/makeitcount". That was found to amount to passing off the advertisement as personal comment.

Fellow footballer Rio Ferdinand and glamour model Katie Price have also been the subject of complaint. Mr Ferdinand tweeted "really getting into the knitting .... Can't wait to get home from training and finish that cardigan ... you're not you when you're hungry@snickersUk#hungry#spon" across a series of five tweets, all sent within an hour. The last indicated that it was sponsored, but the others did not. Each tweet was found be part of an orchestrated series in a marketing campaign. Similarly, Ms Price made comment including "large scale quantitative easing in 2012 could distort the liquidity of govt. bond market" before concluding with the same final tweet. In each case the final tweet included a picture of the person holding a snickers bar in the promotion of Mars products.

Mars argued that each of the earlier tweets was "obviously identifiable" as an advertisement as they were statements made out of character. I am not aware of Ms Price's knowledge of the state of European fiscal policy or of Mr Ferdinand's ability to knit one purl two, but that would seem to be the case. However, the regulator disagreed.

In another example swimmer Libby Trickett was censured by the Australian Olympic Committee for retweeting a comment sent to her by a sponsor containing their name during the Olympics.

While many people may not have the number of followers which those high profile personalities attract, the principles remain the same – any advertising content which is placed on social media should be examined to see whether it complies with relevant codes of practice. The nature of the ads should also be examined to consider whether it may infringe other laws such as the *Competition and Consumer Act*, should the material be misleading and deceptive.

Although a number of celebrities have recently been the target of unfavourable comment on Twitter and other social media and have indicated that they will discontinue using these platforms (largely due to bullying or "trolling" which is unacceptable in any form, but don't get me started on that) the practice will no doubt be with us for some time to come.

* I may have made this up

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DAVID WILLIAMS
EDITORIAL

In discussions with clients there is an emerging trend of ongoing dissatisfaction from business owners and operators that governments are interfering and creating more red tape. There is great uncertainty in relation to whether mining is on the way up or on the way down, which also erodes the confidence of consumers. Whether right or wrong the perception is that mining is powering ahead while the rest of the economy struggles. If this perception of mining is wrong, then other issues will need to be addressed very soon if the state of the economy is in fact fading.

No matter what view you take in relation to the mining/China scenarios, it is quite clear there is a crisis of spending from Australian consumers. The fundamentals in relation to savings and private debt are favourable, but the real concern is the growing level of debt of governments at the various tiers within Australia and around the world. The crisis of government debt overseas is chronic and the only way out of this debt problem is that governments will need to sell unnecessary assets or increase levels of taxation. This can only occur with a significant increase in consumer activity that creates confidence throughout all levels of business, thus enabling the increased levels of taxes to be paid.

We are also seeing promising signs in the M&A transactional area of sales and purchases occurring. The common theme in all these transactions is that they are taking time, and patience is an absolute virtue be you a seller or a buyer. The banking and financial institutions are not giving comfort to their customers, with daily changes in the types of transactions they can or can't do and whether or not credit departments will approve or not. This along with the increased dissatisfaction with government creates a significant uncertainty that will continue to impair the recovery of business and the resurrection of consumer confidence.