

Update: 15 July 2009 Minuting the meeting: Why it matters



Fleming Muntz
Solicitors



Summary

The NSW Supreme Court decision relating to James Hardie's asbestos liabilities shows the importance of recording minutes of directors' meetings as the *Corporations Act* requires.

What was the case about?

The James Hardie case was brought by ASIC against the company's Board members in relation to the now infamous 2001 ASX and media release stating that all asbestos claims were 'fully funded'.

Since the judgement was delivered in April this year, most attention has focussed on the Court's finding that all directors had breached their duty in approving the press release, despite engaging several external advisors to assess the position and advise the Board.

However the case also shows how closely minutes of directors' meetings will be scrutinised in any case involving decisions of the Board.

What was the decision?

Minutes of a meeting of directors must be recorded in a minute book within one month under section 251A of the *Corporations Act 2001*. Emails in this case demonstrated that this could not have happened, constituting a breach.

Minutes properly recorded are also presumed to be an accurate record of what occurred at the meeting. As this had not happened, the minutes were not 'evidence' and events of the meeting had to be proven by other, more complex, evidence.

What are the lessons?

The decision shows the importance of several principles that apply to everyday corporate governance:

- Resolutions should be recorded in the minute book within one month of the meeting.
- Minutes should be signed by the Chair within a reasonable time after the meeting.
- Minutes should be an accurate record of proceedings because of the special evidentiary value given to them.

Failing to comply is at least going to be a non-specific breach of the Act, will likely attract adverse comment for advisors involved in the minuting and may cause evidentiary difficulties.

How can Fleming Muntz help?

Fleming Muntz specialist business lawyers have ample experience in, and can advise on, issues relating to Board procedure and other aspects of corporate governance.

Important fine print

This update is for general information only. It is not a complete guide to the area of law. Competent advice should be obtained before taking any action.

We resent unwanted email as much as anyone – if you would prefer not to receive any further updates, please telephone us on (02) 6021 2222 or email to enquiries@flemingmuntz.com.au.

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