A poison draft for Hardie directors
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The Supreme Court's decision to ban 10 former directors of James Hardie will probably be seen by most who sit around board tables as placing them in a new and onerous legal vice.

Non-executive directors were banned for five years and the executive directors, Peter Macdonald, Peter Shafron and Phillip Morley, for 15, seven and five years respectively. Fines ranged from $350,000 for Macdonald to $30,000 for non-executive directors, who include the former AMP directors Peter Willcox and Meredith Hellicar.

The length of the bans were at the upper end of expectations.

From the Supreme Court's Justice Ian Gzell it is a clear and loud signal to the elite community of company directors about corporate governance standards and their legal disclosure obligations. It is no more than that, yet there is little doubt these directors will seek to appeal.

There is a lot riding on it for them. For these directors - all of whom have held senior executive and/or board positions for major companies - the fines probably would be of little consequence. This is all about their reputations. The most senior of those penalised yesterday, Willcox, is a former chairman of AMP and the man who had previously been a favourite to chair Telstra.

Yesterday's decision will seriously retard their ability to get another senior corporate position - even after the bans have run their course.

The court has determined these directors have engaged in a serious and flagrant breach of their duties as directors. And the lengths of the bans support this. Gzell argued that the directors were aware of the significance of the announcement to the market on the level of funding the company had placed in a trust to cover Hardie's compensation for victims of asbestos-related diseases.

He said: "The non-executive directors were endorsing Hardie's announcement to the market in emphatic terms that the [compensation] foundation had sufficient funds to pay all legitimate present and future asbestos claims, when they had no sufficient support for that statement and they knew or ought to have known that the announcement would influence the market.

"Here the negligently made misleading statement was serious as it was a deliberate attempt to influence the market of the separation of [subsidiaries] Coy and Jsekarb, with their attendant asbestos claims, from the James Hardie Group."

The judge said the directors should have complained about the statements in the draft press release that contained the details of the funding. None did.

Rather, the directors gave evidence that they did not read, or had no recollection of reading, the press release. The release said a new compensation trust would be ”fully funded“ and offered ”certainty“ to claimants suffering from asbestos diseases.

”I did not accept the chorus of denial of recollection to be genuine,“ he said.

This decision will support those who have long contended that blue-blood Australian boards select from their own to fill vacancies without regard to appointees' appropriateness and operate in a collegiate fashion that is not necessarily in shareholders' interests.

At the other end of the spectrum there will be a view that this decision and the penalties attached will make it difficult to attract top level board candidates.

Even the peak body representing Australian boards, the Australian Institute of Company Directors, is not contending with any certainty that this judgement represents new law in the area of directors' duties and responsibilities.

The existing law deals with the duty to act honestly and disclose material information to the market.

Justice Gzell does not seem to have imposed new or more rigorous standards of corporate governance. Rather, his judgment is about upholding the existing ones.