

ASIC warns directors on breaches

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The corporate regulator has put boards on notice that it will pursue a vigorous campaign against company directors for breaching their duties this year, despite a series of high-profile setbacks in 2009.

In his first public comments following a number of significant defeats in the courts, Australian Securities and Investments Commission chairman Tony D'Aloisio said the regulator also planned to use special powers under the corporations law to bring more cases against companies and their directors to better protect retail investors.

"We have taken the view that it is our job as the regulator to push the regulatory regime to the limit," he said in an interview with *The Australian Financial Review*.

"As long as the law is as it is on directors' duties, then ASIC will enforce those obligations where we feel there has been wrongdoing."

ASIC has hit back after a string of court losses by launching criminal proceedings against the three directors of collapsed stockbroking firm Opes Prime for breaching their directors' duties. Each faces a maximum penalty of five years in jail.

Mr D'Aloisio defended criticism of ASIC's enforcement record on directors' duties, despite three big losses for the regulator in the last five weeks of 2009.

In November, the NSW Supreme Court threw out ASIC's eight-year case against One.Tel founder Jodee Rich and executive Mark Silbermann - estimated to have cost more than \$20 million - and criticised the regulator for exaggerating facts and running a superficial case.

ASIC also had one of two cases against former AWB managing director Andrew Lindberg thrown out of court as an abuse of process in December and its primary case has been criticised by the judge. ASIC is appealing against both decisions.

Shortly before Christmas, the Federal Court in Perth then dismissed proceedings brought by ASIC - which according to some reports also cost \$20 million - that claimed Fortescue Metals and billionaire Andrew "Twiggy" Forrest had misled investors.

The ruling in effect implied that company boards were entitled to publish incorrect information so long as they reasonably believed it to be true.

ASIC has until February 4 to lodge court documents but is expected to appeal against the decision, which corporate law experts said had changed the traditional interpretation of continuous disclosure laws.

"If you look at the cases we have been running . . . these are proper enforcement actions for ASIC to take and my own view is that irrespective of winning or losing, we have a responsibility to the community to take the hard cases on. What's important to me is that the hard cases we do take on establish a very firm principle, whether you win or lose it, that improves integrity in the market," Mr D'Aloisio said.

"There is no doubt that in litigation and these processes there will be technical manoeuvres and things you lose, things you win but you have to stay focused on the end result."

He pointed to ASIC's win in the James Hardie case in April last year as redefining new ground for the duties of non-executive directors.

"In the James Hardie case, what was important there - and that is subject to appeal - if a board of directors takes on a strategy which is betting the farm with the company, then their obligations extend right through to making sure that the market is properly informed through market releases.

"Clearly you have got to have reasonable prospects of success or better . . . then you have to weigh up your public interest considerations, but as I see it with this commission, this commission is minded to take the hard cases on and to see them right through.

"Don't get me wrong, we totally accept what the judge is saying what the rules of law are, but like any litigant, we are entitled to pursue the same approach as other litigants and that is all we are doing," he said.

The regulator has launched a case against the entire 2007 board of Centro Properties Group, alleging it breached its duties by approving accounts containing material misstatements.

The case has been criticised for potentially redefining the expectations on non-executive directors when they sign off on accounts.

For directors without special auditing skills, it is also expected to examine how their duty to act with care and diligence, as it relates to company accounts, is discharged.

The case will examine whether those occupying special positions in companies, such as the chief financial officer or audit committee chairman, have enhanced duties and will consider at what point directors are no longer able to rely on the advice of others.

In court documents, ASIC has been at pains to spell out the specific expertise and knowledge of each non-executive director, but Mr D'Aloisio denied that ASIC was seeking to impose enhanced duties for NEDs with special experience.

"In framing the cases the way we frame them, we give the court the opportunity to be able to be quite clear on what they think are the factors that should be taken into account and what ultimately they think the duties of the non-executive directors are in situations where they are considering accounts, in situations where they are reviewing asbestos liabilities claims and so on.

"I think we are getting clearer focus ourselves because we are taking the cases on that we are getting greater clarity around where the bar always was," he said.

Mr D'Aloisio hoped that ASIC would break new ground in 2010 by using a little-known public-interest power, after launching a \$200 million damages claim against KPMG last year, alleging it had botched the audit of collapsed property giant Westpoint.

Section 50 of the Corporations Act gives ASIC the power to take civil proceedings for damages "in the public interest".

"The section 50 case in Westpoint and other actions we take is a very, very important development for ASIC. It is being used more by this commission to really look at where we feel that it's in the public interest that groups of investors should have access to redress because they're not able to get satisfactory redress through other means, whether it is class actions or their own individual action or liquidation," he said.

Mr D'Aloisio defended the decision of ASIC to appeal against the One.Tel and AWB decisions as justified on the basis of public interest, despite the escalating costs.

"In the AWB matter, significant damage was done to AWB including the loss of its one desk and share-price impact from the oil for food scandal. ASIC is focused in its investigations on market-integrity issues about corporate governance.

"These are issues that in hard fought litigation you need to assess and take on board and our judgement [in the AWB case] is that on the advice we have received is that on this latest ruling we should appeal and we have and when we take a case on, clearly we want to run the case to the best of our ability."

The Australian Financial Review

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