ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S173 of 2011

BETWEEN

PETER JAMES SHAFRON
Appellant

and

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION OF SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The issues arising on this appeal are whether:

   (a) the Court of Appeal erred in finding that Mr Shafron was a person who participated in the making of decisions that affect the whole or a substantial part of the business of James Hardie Industries Limited (**JHIL**) within the meaning of subparagraph (b)(i) of the definition of *"officer"* in the *Corporations Act 2001* (Cth);[1]

   (b) the exercise of powers and performance of duties by Mr Shafron (or his failure to exercise powers and perform duties) in connection with the impugned conduct were subject to the obligation imposed by s 180(1) because Mr Shafron was an officer by virtue of being company secretary;

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[1] At the relevant time the applicable legislation was the Corporations Law of New South Wales (explained below at footnote 10). Upon its commencement the *Corporations Act* contained an identical version of s 180(1) and an identical definition of *"officer"* in s 9 such that those provisions were *"corresponding provisions"* within the meaning of s 1371(2) of the *Corporations Act*. Thus, by operation of s 1400(2) of the *Corporations Act*, any liability of Mr Shafron for a contravention of former s 180(1) of the Corporations Law was substituted by a corresponding liability under s 180(1) of the *Corporations Act*.

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(c) the conduct of Mr Shafron as impugned in these proceedings involved him performing his duties and responsibilities as a company secretary of JHIL;

(d) the Court of Appeal erred in finding that Mr Shafron contravened s 180(1) by failing to advise the Chief Executive Officer or the board of JHIL that they needed to consider whether JHIL was required to disclose certain information concerning the Deed of Covenant and Indemnity (**DOCI**) to the Australian Stock Exchange (**ASX**), failing to obtain advice for them as to whether they were required to disclose that information to the ASX or in failing to advise them that it should be disclosed; and

(e) the Court of Appeal erred in finding that Mr Shafron contravened s 180(1) by failing to advise the board of JHIL that the February 2001 Trowbridge report and the Trowbridge 50 year estimate did not take into account *"superimposed inflation"* and a prudent estimate would have.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. ASIC does not consider that notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

PART IV: FACTS

4. The facts asserted in [6] to [9] and [11] to [16] of Mr Shafron's submissions (**SS**) are not disputed (although in the case of SS[11] the entirety of the Court of Appeal's findings concerning the role of Allens at CA[1022]-[1030] ABWhi/198.47-200.26 need to be considered). However ASIC disputes that SS[10] accurately reflects either the Court of Appeal's findings or the evidence. The first three sentences reflect, but do not exhaust, the findings as to the scope of his duties by either the trial judge or the Court of Appeal (see LJ[379]-[385] ABRed2/511W-513N and CA[889] ABWhi/173.46). In addition to his extensive legal qualifications and experience (CA[922] ABWhi/179.43; LJ[378] ABRed2/511T), Mr Shafron was the second or third most senior executive of JHIL, reporting directly to the CEO, Mr Macdonald (CA[889] ABWhi/173.46). In relation to the balance of SS[10] the Court of Appeal did not find that Mr Shafron's *"role was confined to advising the board in relation to proposals put forward for its consideration and decision, and implementing them"*. To the contrary, the Court of Appeal found,

inter alia, that *"what Mr Shafron did went well beyond administrative arrangement, and well beyond providing advice or information as required"* (CA[895] ABWhi/175.34) and Mr Shafron was *"part of the Project Green team, and of its promotion of the separation proposal to the board"* (CA[894] ABWhi/175.17).

PART V: LEGISLATION

5. ASIC accepts Mr Shafron's statement of the applicable statutory provisions but it is also necessary to have regard to ss 761 and 1001A of the Corporations Law as in force in February 2001 (and as taken to be included in the *Corporations Act* by s 1401) and ASX Listing Rule 3.1. Copies of those provisions and ASX Listing Rule 3.1 are attached.

PART VI: ARGUMENT

Officer (SS[18] to [63])

6. The Court of Appeal found that, in engaging in the conduct the subject of the contraventions found against him, Mr Shafron was subject to the duty imposed by s 180(1) of the *Corporations Act* on three separate bases, namely: (i) he participated in the making of decisions that affected the whole or a substantial part of the business of JHIL within the meaning of subparagraph (b)(i) of the definition of *"officer"* (CA[897]-[898] ABWhi/173.46-176.3); (ii) as a person occupying the office of secretary of JHIL, his conduct in advising the board was subject to the duty imposed by s 180(1) because that was part of his *"responsibilities within the corporation"* as referred to in s 180(1)(b) (CA[916] ABWhi/178.48); and (iii) his conduct involved him acting within his responsibilities as company secretary (CA[929] ABWhi/181.21). ASIC submits that the Court of Appeal was correct to so find in all three respects.

Legislative history

7. Until 1981 Australian companies legislation did not contain any exhaustive definition of *"officer"*. Early State and Territory companies legislation was based on English equivalents and that legislation did not impose duties or establish offences for persons

described as *"officers"*.[2] The first such provision was s 107(2) of the *Companies Act 1958* (Vic) (**1958 Act**) which imposed a duty on an *"officer"* of a company not to *"make use of any information acquired by virtue of his position as an officer to gain an improper advantage for himself or to cause detriment to the company"*.[3] Subsection 3(1) of the 1958 Act defined officer as *"includ[ing] a director and any other officer whatsoever of a company"*. Provisions to the same effect were included in the 1960s uniform companies legislation.[4]

8. Various criminal statutes of the States and Territories have made (and, in some cases, still make) provision for offences by a company *"officer"*,[5] but they either did not define the term or only did so by using an inclusive definition.[6] The authorities concerning the meaning of *"officer"* are discussed by the New South Wales Court of Criminal Appeal in *R v Scott* (1990) 20 NSWLR 72.[7] Gleeson CJ (as his Honour then was) held (at 79D) that for the Crown to establish that a person is an *"officer"* it would have to demonstrate that the accused held *"an office by virtue of which he participated in the management or administration of the affairs of the company"* and that *""office" refers to a specific position which usually (although not necessarily) carries a title and which has identifiable functions and responsibilities"*.

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[2] For enactments based on the *Companies Act 1862* (UK) see the *Companies Act 1863* (Qld), *Companies Act 1863* (SA), *Companies Statute 1864* (Vic), *Companies Act 1869* (Tas), *Companies Act 1874* (NSW) and *Companies Act 1893* (WA). For enactments based on the *Companies Act 1929* (UK) see the *Companies Act 1931* (Qld), *Companies Act 1934* (SA), *Companies Act 1936* (NSW), *Companies Act 1938* (Vic), *Companies Act 1943* (WA), *Companies Ordinance 1931* (ACT) and *Companies Ordinance 1954* (ACT).

[3] As the Senate Standing Committee said in its *Company Director's Duties Report on the Social and Fiduciary Duties and Obligations of Company Directors* (known as the *"Cooney Committee Report"*) at [3.15]: *"it seems that, before [1958], no corresponding provision had been contained in the company legislation of any other English speaking country"*.

[4] See ss 5(1) and 124 of the *Companies Act 1961* (NSW), *Companies Act 1961* (Vic), *Companies Act 1961* (Qld), *Companies Act 1961* (WA), *Companies Act 1962* (SA), *Companies Act 1962* (Tas), *Companies Ordinance 1962* (ACT) and *Companies Ordinance 1963* (NT).

[5] See eg the *Crimes Act 1900* (NSW) ss 173 (rep) and 192H; *Criminal Law Consolidation Act 1935* (SA) ss 146(1)(e), 149 and 189-192 (rep); Criminal Code (NT) ss 233-234; Criminal Code (Qld) ss 437 (rep), 438 (rep) and 441 (rep); Criminal Code (Tas) ss 261-262 and Criminal Code (WA) ss 419-421, 537, 547 and 548.

[6] As to the latter, see the *Crimes Act 1900* (NSW) s 4(1) (*"officer"*).

[7] This case concerned the *Crimes Act 1900* (NSW) s 173 (rep). It was cited with approval in *R v Ronen* (2004) 62 NSWLR 707 at 718 (Spigelman CJ, Mason P and Kirby J relevantly agreeing). See also *Jesseron Holdings Pty Ltd v Middle East Trading Consultants Pty Ltd* (1994) 13 ACSR 455 at 460 (Young J).

9. The Uniform Codes[8] (**Codes**) imposed a number of duties on directors and officers including, for the first time, a statutory duty of diligence (attracting criminal sanctions) on *"officers"* (s 229(2)).[9] It provided:

> *"An officer of a corporation shall at all times exercise a reasonable degree of care and diligence in the exercise of his powers and the discharge of his duties."*

The term *"officer"* was relevantly defined by s 229(5) of the Codes as meaning *"a director, secretary or executive officer of the corporation"*. *"Executive officer"* was, in turn, defined by s 5(1) as meaning *"any person, by whatever name called and whether or not he is a director of the corporation, who is concerned, or takes part, in the management of the corporation"*. This concept was addressed in *Commissioner for Corporate Affairs v Bracht* [1989] VR 821 (referred to at LJ[386]-[388] ABRed2/513P-514S, CA[883] ABWhi/171.47 and CA[886]-[887] ABWhi/173.15-36).

10. The Corporations Law[10] included a definition of officer and statutory duties in s 232, including a duty of reasonable care and diligence in s 232(4), which were materially identical to s 229 of the Codes. The definition of executive officer in s 9 of the Corporations Law corresponded to that in s 5(1) of the Codes.

11. For present purposes two significant amendments to the *Corporations Law* were made with effect from 1 February 1993 by the *Corporate Law Reform Act 1992* (Cth).[11]

12. First, in addition to the existing criminal sanctions,[12] a new civil penalty regime was introduced[13] for, inter alia, breaches of the statutory duties imposed on directors and officers. Second, s 232(4) was amended so that it read:

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[8] *Companies Act 1981* (Cth). See also ss 6 of the *Companies (Application of Laws) Act 1981* (NSW), *Companies (Application of Laws) Act 1981* (Qld), *Companies (Application of Laws) Act 1981* (Vic), *Companies (Application of Laws) Act 1981* (WA), *Companies (Application of Laws) Act 1982* (SA), *Companies (Application of Laws) Act 1982* (Tas) and *Companies (Application of Laws) Act 1986* (NT).

[9] Previously such a duty had been imposed only on *"directors"*. For example, s 107(2) of the *Companies Act 1958* (Vic) provided: *"A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office"*.

[10] The Corporations Law was contained in s 82 of the *Corporations Act 1989* (Cth). It operated from 18 December 1990 of its own force in the Australian Capital Territory and operated from 1 January 1991 by application elsewhere: see s 7 of the *Corporations (New South Wales) Act 1990* (NSW), *Corporations (Northern Territory) Act 1990* (NT), *Corporations (Queensland) Act 1990* (Qld), *Corporations (South Australia) Act 1990* (SA), *Corporations (Tasmania) Act 1990* (Tas), *Corporations (Victoria) Act 1990* (Vic) and *Corporations (Western Australia) Act 1990* (WA).

[11] Act No 210 of 1992.

"In the exercise of his or her powers and the discharge of his or her duties, an officer of a corporation must exercise the degree of care and diligence that a reasonable person in a like position would exercise in the corporation's circumstances."

13. The Explanatory Memorandum stated that the addition of the words *"in a like position"* would enable the Court to consider any special expertise held by individual directors and the distribution of functions within the corporation[14] (see *ASIC v Rich* (2003) 44 ACSR 341 at [40] to [43] per Austin J; see below at [25]).

14. With effect from 13 March 2000, the *Corporate Law Economic Reform Program Act 1999* (Cth) (**CLERP Act**) repealed, inter alia, s 232 and substituted a new Chapter 2D.1 concerning *"officers and employees"* which included s 180(1).[15] A new definition of *"officer"* was inserted into s 9.[16] The new provision and new definition were in the same form as relevant to this appeal (and in force now).[17] The new definition of *"officer"* removed the reference to being *"concerned in and taking part in the management of the corporation"* and inserted subparagraphs (b)(i) and (ii). Relevantly, the new s 180(1) involved the removal of the words *"in a like position in the corporation"* but added the phrase *"the same responsibilities within the corporation as, the director or officer"*.

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[12] After the *Corporate Law Reform Act* breaches of the duties imposed by s 232 only attracted criminal sanctions if the contravention was undertaken *"knowingly, intentionally or recklessly"* and either *"dishonestly and intending to gain, whether directly or indirectly, an advantage for that or any other person"* or *"intending to deceive or defraud someone"*: s 1317FA.

[13] By new Part 9.4B of the Corporations Law.

[14] Explanatory Memorandum to the *Corporate Law Reform Bill 1992* at [39]; see also [85].

[15] Item 1 of Schedule 1 to the CLERP Act.

[16] Item 112 in Part 1 of Schedule 3.

[17] For a period both the Corporations Law and the *Corporations Act* contained a more expansive definition of *"officer"*, in that it included employees. It was inserted into the Corporations Law with effect from 1 August 1991 by the *Corporations Legislation Amendment Act 1991* (Cth). This provision was carried over into the *Corporations Act*, but was repealed in 2004 by item 11 of Schedule 9 to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth). This definition never had any relevance to either s 232 of the Corporations Law, as s 232(1) contained its own definition of *"officer"*, or, after the commencement of the CLERP Act, to s 180 as s 179(2) specified that the definition of *"officer"* in s 9 of the Corporations Law was applicable to ss 180, 181 and 182. Section 82A, while it was in force, applied where the term *"officer"* was used by a provision in relation to a *"body corporate"* or an *"entity"*. The application of s 82A in relation to an *"entity"* included accounting standards and related party transactions (see Ch 2E and 2M of the *Corporations Act*). Its application in relation to a body corporate was more complex, particularly because s 57A defined a corporation to include a body corporate. However, s 82A most obviously applied where provisions of the Corporation Law and *Corporations Act* specifically mentioned an officer of a body corporate without further definition of the term (eg ss 206E, 411(7), 418, 448C(1)(d), 1002E (now repealed), 1002R (now repealed), 1254 (now repealed)).

15. Two matters emerge from the extrinsic material concerning the CLERP Act.[18] First, none of that material contains any discussion of the significance or otherwise of either the changes to the definition of officer from the form described in [9] above and discussed in *Bracht* to its present form or the inclusion of the phrase *"participates in making"* in subparagraph (b)(i) of the definition. This suggests that the new definition was not intended to effect any significant departure from, much less any narrowing of, the previous definition. Second, there was extensive discussion in Treasury Discussion Paper No 3, *Directors Duties and Corporate Governance: Facilitating Innovation and Protecting Investors*[19] and the Explanatory Memorandum to the Bill[20] about the need to consider an individual director's skills, qualifications and position within the corporation in determining whether they satisfied their statutory standard of due care and diligence.[21] In *Rich* at [44] to [50] Austin J analysed this material as explaining the rationale for the addition of *"responsibilities ... of the director or officer"* in s 180(1)(b). This was endorsed by the Court of Appeal (CA[900]-[904] ABWhi/176.16-177.32 and CA[907] ABWhi/177.49). It is further referred to below.

Participation in decisions (SS[18] to [40])

16. The reasoning of the Court of Appeal in support of its conclusion that Mr Shafron satisfied subparagraph (b)(i) of the definition of *"officer"* is found at CA[885]-[898] ABWhi/173.11-176.2. The Court of Appeal considered that the extension of the definition of *"officer"* in subparagraph (b)(i) beyond a director and a secretary to include persons who participated in making decisions meant that it was not necessary for the relevant person to be an *"ultimate controller"* and that whether their level of involvement rose to the level that they could be said to have participated in the making of the decision was *"a question of fact and degree"* (CA[892] ABWhi/175.1). The Court held that the relevant participation must be more than mere *"administrative arrangement"* and that there must, at a minimum, be a *"real contribution from the postulated participation to the making of the decisions, but beyond that it is a question*

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[18] Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998, Second Reading Speech by the Hon Joe Hockey MP, Hansard, HR, 03.12.98, 1284, Joint Committee on Corporations and Securities, *Report on the Corporate Law Economic Reform Program Bill 1998*, May 1999.
[19] Pages 43-45, 55-56.
[20] Page 26 at paragraphs 6.23-6.25.
[21] Treasury Discussion Paper, page 45.

of fact" (CA[893] ABWhi/175.14). The Court considered the degree and depth of Mr Shafron's role in relation to the separation proposal (CA[894] ABWhi/175.17) and concluded that he participated in decisions affecting the whole or a substantial part of JHIL's business (CA[895] ABWhi/175.34).

17. Mr Shafron contends that the phrase *"participates in making"* a decision could only be invoked *"where the person has actually taken part in the making of the decision"* (emphasis added) (SS[26] and SS[28]) and asserts that his involvement did not reach that level. ASIC makes four submissions in response.

18. First, Mr Shafron misstates the Court of Appeal's reasoning. He repeatedly asserts that the Court of Appeal considered that it was sufficient if there was *"only a real contribution from the postulated participation to the making of the decision"* (SS[30], SS[23] and SS[24]). He suggests that the Court of Appeal's approach will result in many persons other than the ultimate decision makers such as *"law firms, investment banks, actuaries, accountants and other advisors"* satisfying the definition of an *"officer"* (SS[40]). However, at CA[893] ABWhi/175.14 the Court of Appeal noted the necessity (not the sufficiency) for there to be a *"real contribution"*. Whether there was the requisite *"participation"* was, according to the Court, a question of *"fact"* (CA[893] ABWhi/175.16) or *"fact and degree"* (CA[892] ABWhi/175.1). The Court of Appeal's approach does not involve any gloss or departure from the statutory language but instead recognises that whether the statutory definition is satisfied is ultimately a question of fact. It is a question of fact that will not be satisfied by external advisers who confine themselves to an advisory role (CA[896]-[897] ABWhi/175.38-51).

19. Second, contrary to Mr Shafron's assertion (SS[10], SS[32] and SS[33]), the Court of Appeal did not accept that his *"role was confined to advising the board in relation to proposals put forward ..."*. To the contrary, the Court of Appeal found that his role went *"well beyond providing advice or information as required"* (CA[895] ABWhi/175.34). The trial judge specifically addressed his role at LJ[378]-[385] ABRed2/511S-513O (noted at CA[889] ABWhi/173.46). When considered against the history of the pursuit of the separation proposal within JHIL from December 1999 to its adoption in February 2001 (CA[55]-[123] ABWhi/15.37-29.22), these findings demonstrate the significance of Mr Shafron's role. During this period, the three most senior executives within JHIL, Messrs Macdonald, Shafron and Morley, formulated and proposed to the board a

number of *"variants"* of the separation proposal (CA[56] ABWhi/15.47, CA[68] ABWhi/18.35 and CA[71]-[90] ABWhi/19.6-23.44). At the January 2001 meeting Messrs Macdonald and Shafron presented the net assets model which the board rejected (LJ[89] ABRed2/423J; CA[91] ABWhi/23.47). Messrs Macdonald and Shafron then formulated a revised model with funding to the actuarial assessment provided via the DOCI which the board accepted on 15 February 2001 (CA[100] ABWhi/25.44). The board's role in this process was reactive. It was not formulating separation proposals much less devising their structure. On the other hand Mr Shafron was proactive. As found by the Court of Appeal he was part of the *"promotion of the separation proposal to the board"* (CA[894] ABWhi/175.19).

20. Third, Mr Shafron's approach would unduly limit the definition of the term officer in s 9(b)(i). SS[27] contends that the relevance of the word *"participates"* is to *"catch all persons taking part in the making of a decision"*. The Court of Appeal's approach is entirely consistent with that objective provided that no narrow view is adopted of what constitutes *"taking part in the making of a decision"*. Mr Shafron further asserts (SS[27]) that the inclusion of the word *"participates"* also captures for example: *"(a) a person who makes a decision jointly with other persons; (b) a person who is a member of a body (such as a committee) that makes decisions whether or not that person is for or against the decision that is ultimately made; and (c) a person who makes a decision that is, or may be, subject to ratification or reversal by superiors"*. If these examples are meant to exhaust the breadth of what is meant by *"participates"* in subparagraph (b)(i) then that phrase has little work to do. Of these examples, both (a) and (c) would involve the relevant person actually making the decision, not just participating in the making of the decision. It is unlikely that the only work intended to be undertaken by the word *"participates"* in subparagraph (b)(i) of the definition was to pick up those embraced by scenario (b).

21. Mr Shafron's approach would limit the relevant inquiry to the single point in time at which the *"decision"* was made and ignores the roles performed by an individual in shaping, developing and presenting to the board initiatives on important aspects of the company's affairs over an extended period of time and implementing them. This approach is divorced from the realities of the interaction between the very senior

executives of large public companies and the non executive members of their boards of directors.[22]

22. Fourth, Mr Shafron's complaints (SS[35]-[37]) about three of the matters the Court of Appeal referred to in CA[894] ABWhi/175.17 overstate the significance of these matters in the Court's reasoning. At CA[894] ABWhi/175.17, the Court of Appeal only instanced them as examples of his general participation in the making of decisions of the requisite character by the board. The Court did not assert that each of them considered individually was an example of him participating in decisions of the requisite character (cf SS[37]). The Court's critical finding is in the first part of CA[894] ABWhi/175.17 concerning the separation proposal of which Mr Shafron makes no separate complaint. His assertion that they all fell within his *"advisory and assistance role as general counsel"* (SS[36]) simply restates the characterisation of his role as an *"advisor"* that the Court of Appeal rejected.

23. Further, Mr Shafron's contention that these matters were not relied on by ASIC either at trial or in the Court of Appeal and that he lost some opportunity to address in relation to them misstates the position. In its particulars served well before trial, ASIC identified Mr Shafron's involvement in Project Chelsea, his making of presentations to the board (which would include those concerning asbestos related issues) and his responsibilities in relation to the content of announcements of significance as circumstances relevant to whether he met the statutory definition of officer.[23]

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[22] R P Austin, "The Company Secretary: Then and Now" (Chartered Secretaries Australia Ltd, Sydney, 19 November 2002) describes the current circumstances as one whereby control of corporate businesses is subdivided between the management function, exercised by senior executives, and the function of monitoring management, exercised by non-executive board members. He describes this position as a product of *"corporate governance thinking"* under which the function of the board is *"overseeing"* or *"reviewing"* the work of senior executives of the company rather than directly managing the company's business.

[23] ASIC provided particulars of the then Further Amended Statement of Claim (**FASOC**) to Mr Shafron's solicitors under cover of a letter dated 21 September 2007. In paragraph 1 of the letter, ASIC provided particulars of [19A] of the FASOC. In subparagraph (1)(c)(i), the letter particularised Mr Shafron's duties of general counsel and company secretary by reference to [18(a)-(d)] of the FASOC. This should have been a reference to [20] of the FASOC, which referred to Mr Shafron's responsibilities of reviewing the content of important announcements. Subparagraphs 1(c)(iii) and (iv) of the letter referred to Mr Shafron's roles in relation to preparing JHIL board papers and making presentations at board meetings of JHIL, and subparagraph 1(c)(ix) referred to his role in instructing external advisors to advise the board of JHIL. This would clearly embrace Mr Shafron's retaining of external actuaries and reporting to the board on asbestos litigation and risk management, as referred to in CA[894] ABWhi/178.17. Subparagraphs 1(c)(v)(A) and (vii) referred to Mr Shafron's role in Project Chelsea, although they did not specifically refer to him receiving a conferral of authority to finalise the

Duties of company secretary and "responsibilities within the corporation"

24. In finding that s 180(1)(b) is *"directed to the scope and range of responsibilities actually carried out by the director or officer whose conduct is in issue"* (CA[908] ABWhi/178.8) the Court of Appeal adopted the analysis of Austin J in *Rich* at [40] to [50] (CA[900] ABWhi/176.16; CA[907] ABWhi/177.49). The Court considered that this construction was reinforced by the reference to *"their powers"* and *"their duties"* in the opening words to the section (CA[909] ABWhi/178.15) and that a contrary construction, which required an attribution of particular functions performed by a person to a specific *"office"*, whether director or secretary, would be difficult to apply (CA[913] ABWhi/178.37). Finally the Court noted that ss 198B and 198C confirm that a person occupying the office of director can have both fewer and greater responsibilities than may usually be the case and the same should apply to the position of secretary (CA[915] ABWhi/178.43).

25. As noted, Austin J in *Rich* addressed the legislative history of s 180(1). His Honour explained that the significance of the addition of the words *"the same responsibilities within the corporation, as the director or officer"* in s 180(1)(b) at the time of the CLERP Act was that it *"was intended to direct attention to the factual arrangements operating within the company and affecting the director in question"* (at [49]). In *Rich* Austin J considered the position of Mr Greaves, a director of One.Tel who was also chairman of the board and chairman of its finance and audit committee. His Honour found that the latter two positions were all matters that made or contributed to his *"responsibilities"* within the corporation *"regardless of whether the chairmanship and committee chairmanship were "offices" for the purposes of the first part of s 180(1)(b)"*: (*Rich* at [50]).[24]

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terms of any agreement. Further, in its submissions at trial ASIC referred to Mr Shafron's role in relation to *"reviewing material concerning ... asbestos related issues affecting the group and advising the board on those matters"* as a matter relevant to whether he was an *"officer"* (ASIC's submissions in chief, Chapter 14 at [6]). In footnote 5 to Mr Shafron's submissions he refers to ASIC's position at trial. The paragraphs of ASIC's submissions to which he refers set out a non-exhaustive list of examples of Mr Shafron's participation in decisions and expressly cross-referred back to Chapters 3 to 6 and 8 as well as Chapter 14 of ASIC's submissions in chief.

[24] An article published following the decision predicted that the reasoning in this decision would be applicable where the *"secretary undertakes additional roles (for example, general counsel or finance director) and has high level qualifications and extensive experience"*: M Adams, "Has the role of the Company Secretary changed: how

26. Mr Shafron does not address the analysis of Austin J in *Rich* including his Honour's discussion of the legislative history. He also does not address the Court of Appeal's analysis of ss 198A and 198B and, to the extent he addresses the Court of Appeal's reference to the relevance of common law duties (CA[912]-[913] ABWhi/178.25-37), he misstates its conclusion (SS[46]).

27. Critically, Mr Shafron's analysis ignores the text of the section. Thus SS[43] contends that the phrase *"same responsibilities"* in s 180(1)(b) ensures that the *"actual responsibilities of the office in question (as opposed to the responsibilities of some notional or hypothetical "standard" director or company secretary) are performed to the requisite standard of care"* (emphasis in original, see also SS[44]). However that ignores the phrase *"and had the same responsibilities within the company as, the director or officer"* (emphasis added). This is clearly directed to the *"responsibilities"* of the individual in question not simply the *"office"* they occupy. The *"duties"* they must discharge as referred to in the opening words of s 180(1) include those undertaken to meet their responsibilities as referred to in s 180(1)(b).

28. SS[45] contends that s 180(1) should not be taken as imposing the statutory standard of care and diligence *"on every facet of a person's responsibilities in the company"*. SS[49] provide as examples of such responsibilities the *"day to day responsibilities of an employee elected as the employee representative director"* and a director who *"elects to join the staff committee responsible for planning the annual company Christmas party"*. In the case of the employee representative, there is a qualitative difference between a person who occupies the position of director or secretary and has additional responsibilities and duties assigned to them and someone who occupies two completely unrelated and distinct positions such as a cleaner and non executive director. The same applies in relation to the Christmas party example, although more might need to be known as to what it entails (including, for example, the level of expenditure involved and the role performed by the director as a member of the staff committee). The Court of Appeal and Austin J's constructions did not suggest that duties or functions which are completely unrelated to the position of director or company secretary are subject to s

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can one person get across it all?" (September 2003) *Keeping Good Companies: Journal of Chartered Secretaries Australia Ltd* 469 at 470.

180(1). In the case of Mr Shafron, and as is illustrated by the Court of Appeal's alternate findings in respect to the position of company secretary (CA[917]-[925]) ABWhi/179.7-180.16), it could not be said that the responsibilities he actually carried out and which are the subject of the relevant contraventions were unrelated to his being company secretary (see CA[925] ABWhi/180.14).

Company secretary (SS[41] to [62])

29. The Court of Appeal found that Mr Shafron was subject to s 180(1) in relation to his impugned conduct concerning the Draft ASX Announcement, the cashflow model and the DOCI Information because those were matters that were *"within the duties of a company secretary"* (CA[917] ABWhi/179.9). The Court of Appeal noted Mr Shafron's legal qualifications (CA[922] ABWhi/179.43) and concluded that the company secretary with a legal background would be expected to raise issues such as potentially misleading statements in relation to an announcement to be sent to the ASX and ASX disclosure obligations with the board (CA[926] ABWhi/180.21). The Court of Appeal also concluded that his knowledge of matters relevant to the cashflow modelling were *"by no means a legal matter"* and *"raising the limitations [of the modelling]"* fell within his *"responsibilities as company secretary"* (CA[926] ABWhi/180.27).

30. The Court of Appeal's approach involves a company secretary having a responsibility for advising and assisting the board and taking steps to ensure compliance by the company with its various regulatory and legal requirements. This approach is consistent with the *Corporations Act*. Part 2D.4 deals with the appointment of secretaries. Section 204D provides that they can only be appointed by the board of directors (as does clause 112 of JHIL's articles: ABBlu3/1034L). Section 204F (a replaceable rule) provides that the directors specify the secretary's terms and conditions of his appointment. This is consistent with the secretary being answerable to, and having the confidence of, the board. Company secretaries are not only subject to the duties imposed by ss 180 to 183. Subsection 188(1) provides that a secretary commits an offence if the company contravenes the various provisions listed therein including the lodgement of notices with ASIC (s 146) and the giving of notice of the issue of shares (s 254X) and changes in share structure (s 178C).

31. While there are limits upon the power of a company secretary to bind the company in relation to entering into contracts,[25] it has been held that the secretary has authority as the *"natural mouthpiece"* to speak on behalf of the company as to its affairs.[26] Moreover, in considering what the functions of a secretary are the Court can take into account its own *"knowledge which the Court has of regular business"*.[27] There has been extensive discussion in recent literature concerning the role of the secretary in ensuring and promoting *"governance"* within the company itself. This material emphasises the responsibility of a company secretary in monitoring compliance by the company with its various legal and regulatory requirements as well as assisting the board in its monitoring of management and providing advice and assistance to the board in its decision making.[28] No doubt the extent of these obligations will vary considerably depending on the size of the company, its internal arrangements and the skills and qualifications of the office holder. In the case of Mr Shafron his extensive legal qualifications and experience and his regular attendance at board meetings suggested

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[25] See *Newlands v The National Employers Accident Association (Limited) (In Liquidation)* (1885) 54 LJ QB 428; *Barnett Hoares & Co v The South London Tramways* (1887) 18 QBD 815; *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711; and generally K E Lindgren, "Development of the Power of the Modern Company Secretary to Bind his Company" (1972) 46 ALJ 385.

[26] *Donato v Legion Cabs (Trading) Co-operative Society Limited* (1966) 85 W.N. (Pt 1) (NSW) 242 at 248 (per Wallace P).

[27] *Newlands supra* at 430; see *Lindgren supra* at 386.

[28] C J Phillips, "The Role of the Company Secretary" (March 2003) *Keeping Good Companies: Journal of Chartered Secretaries Australia Ltd* 70 at 70-71. The company secretary is *"the spider at the heart of the corporate governance web"*. Their responsibilities include keeping up to date and closely reviewing *"all legislative, regulatory and corporate governance developments that might affect the company's operations"* and *"She then must take appropriate action to ensure that the company is in a position to comply". "Part of ensuring compliance is to ensure that the board is fully briefed on all such legislative, regulatory and corporate governance developments and that it has regard to them when taking decisions"*. R P Austin (referred to above at footnote 22): *"In the third stage of capitalism, it has become necessary for the company secretary to understand and anticipate the needs of non executive directors who are expected to perform the monitoring role allocated to them by the tenets of corporate governance". "The chairman looks to the company secretary for "guidance", and not merely for mechanical administration of corporate affairs. The guidance might include, for example, briefing the Chairman on current developments in corporate governance - although that would depend on whether the company has a general legal counsel and if so, the subdivision of functions between the company secretary and that person". "Be that as it may, the company secretary comes to "act as the "grout" to fill knowledge cracks that might otherwise appear during the board meeting"*, citing T Handicott, "A Board Member's Perspective on the Secretary's Role" (November 2002) *Keeping Good Companies: Journal of Chartered Secretaries Australia Ltd* 592 at 594. See also F Bush, "Duties and responsibilities of the 21st century Company Secretary" (October 2006) *Keeping Good Companies: Journal of Chartered Secretaries Australia Ltd* 535 at 537; and internationally: The Institute of Chartered Secretaries and Administrators, England (http://www.icsa.org.uk/resources/guidance#text[]tag[Company_secretary]cat[Guidance_notes]page[1]): Guidance note entitled "Best Practice Guide: Duties of a Company Secretary" (published 3 August 1998) at page 4; and Higgs, "Review of the Role and Effectiveness of Non-Executive Directors" (June 2002) at [11.26]-[11.31].

that regulatory compliance and the giving of advice to the board were at the core of his functions as secretary, even assuming there was some component of his overall position as *"Company Secretary and General Counsel"* which did not fall within that office. On any view of s 180(1) Mr Shafron was required to bring his extensive legal qualifications and experience to bear in performing his role of company secretary.

32. The contraventions that were found either by the trial judge or the Court of Appeal against Mr Shafron concerned either his role in advising the board or addressing JHIL's regulatory compliance or both. Thus the failure to give appropriate advice in relation to the Draft ASX Announcement involved a failure to appropriately advise the board and was part of the matrix of facts that lead to a breach by JHIL of s 999 of the Corporations Law in issuing the Final ASX announcement (LJ[638] ABRed2/577O). Similarly, the contravention in relation to the DOCI Information concerned his dealings with the CEO and the board and was part of the matrix of facts that lead to a breach by JHIL of s 1001A of the Corporations Law (LJ[537] ABRed2/550B). The superimposed inflation contravention involved a failure by Mr Shafron to provide appropriate advice and assistance on matters within his knowledge to the board of directors.

33. Mr Shafron's submissions seek to draw an analogy between Mr Shafron's position and that of Mr Donald Cameron (SS[54]). They contend that Mr Cameron's responsibilities as company secretary never rose above purely administrative functions and there is no basis to suggest that Mr Shafron *"possessed ... responsibilities as company secretary additional to those held by Mr Cameron"*. However, unlike Mr Cameron, Mr Shafron had extensive legal qualifications and experience (CA[926] ABWhi/180.17). Unlike Mr Cameron, Mr Shafron attended all of the board meetings during the relevant period (see eg CA[889] ABWhi/173.46). Whatever be the scope of responsibilities said to be attributable to Mr Donald Cameron's position, Mr Shafron cannot divorce the governance aspects of his role of company secretary that flow at least in part from his regular (and presumably expected) attendance at board meetings and his legal qualifications and experience from his role as general counsel. Ultimately this makes the distinction that he seeks to draw between the duties attaching to his position of general counsel and company secretary impossible to maintain.

34. Mr Shafron's submissions (SS[57]) contend that it does not follow from the fact that it is part of the role of the company secretary to lodge notices on behalf of a company that it

is *"part of the company's secretary's role to provide advice as to ... the content of notices proposed to be filed"*. This may or may not follow generally but it is of no relevance to Mr Shafron. The obligation in relation to the filing of notices needs also to be considered with the fact that, as company secretary, it was he who attended board meetings and not Mr Cameron. Any company secretary who is present at a board meeting when it approves an important announcement that they know is misleading has a responsibility to at least warn or advise the board that they are about to act in that way. Further any company secretary who was aware that the company should have addressed the continuous disclosure requirements but had not is obliged to take steps to see that occurs. The difference between Mr Shafron and Mr Donald Cameron is that Mr Shafron had legal qualifications and experience, attended the board meeting and was specifically aware of that matter (cf SS[58]).

35. Finally, SS[60] contends that in relation to the superimposed inflation contravention *"the Court of Appeal did not consider whether or not Mr Shafron's conduct was engaged in as company secretary or general counsel"*. At this point of the inquiry the question is not whether the relevant conduct was engaged in as *"company secretary"* or *"general counsel"* but simply whether it fell within his responsibility as a company secretary irrespective of whether it might also be a function performed by a general counsel. As submitted above, the giving of advice and assistance to the board during its meetings on matters within his knowledge was at the core of the governance role of a company secretary who was expected to and did attend board meetings.

The DOCI Contravention (SS[64] to [69])

36. As at 15 February 2001, JHIL was a *"listed disclosing entity"* within the meaning of former s 1001A of the Corporations Law (LJ[482] ABRed2/535X). At that time, s 1001A of the Corporations Law and ASX Listing Rule 3.1 were in the form attached to these submissions. The combined effect of those provisions was that, subject to certain exceptions provided for in the listing rule, it was a contravention for a listed disclosing entity to intentionally, recklessly or negligently fail to notify the ASX of information that was *"not generally available"* and was of a nature that a *"reasonable person would expect, if it were generally available to have a material effect on the price or value of*

[shares] of the entity".[29] It follows that an assessment as to whether a continuous disclosure information obligation has been triggered required, inter alia, an understanding of market perceptions of the company in question and its likely reaction to disclosure of the specified information.

37. The trial judge found that information concerning the DOCI (**DOCI Information**)[30] was not generally available (LJ[485] ABRed2/537E), was information the disclosure of which would have had a material positive effect on JHIL's share price (LJ[507] ABRed2/543M), was information in respect of which a reasonable person would have expected such disclosure to have had that effect (LJ[507] ABRed2/543O) and that JHIL was obliged to disclose it under ASX Listing Rule 3.1 (LJ[508]-[509] ABRed2/543T-Y and [516] ABRed2/545E). The trial judge further found that JHIL's failure to disclose was negligent (LJ[537] ABRed2/550C), that Mr Shafron was aware of the continuous disclosure regime and that if JHIL failed to comply with the listing rule it would be detrimental to JHIL (LJ[556]-[558] ABRed2/555P-556I). None of these findings were challenged in the Court of Appeal (CA[974]-[975] ABWhi/190.22-42).

38. The contravention found by the trial judge (and confirmed by the Court of Appeal) involved a failure on the part of Mr Shafron to take any of the steps identified at CA[979] ABWhi/192.29. Mr Shafron did not contend that he took any of those steps, ie that he gave any advice to Mr Macdonald or the board or that he obtained any advice from Allens that disclosure of the DOCI Information was not required (CA[997] ABWhi/195.5). Instead, he argued, inter alia, that he discharged his duty because the material revealed that he had either specifically retained Allens to advise on the question of whether the continuous disclosure regime required disclosure of the DOCI or, as he put it, *"Allens had a general retainer to advise JHIL in respect of all aspects of the corporate restructure, including in relation to continuous disclosure obligations"* and that he was *"entitled to rely on the fact that they did not advise that the DOCI Information should be disclosed"* (Mr Shafron's Appeal Submissions at [117] ABOral/387S; CA[997] ABWhi/195.5).

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[29] And an offence if done intentionally or recklessly: s 1001A(3).
[30] As pleaded in [54(j)] of the Fourth Further Amended Statement of Claim: ABRed1/191E.

39. The Court of Appeal rejected this aspect of Mr Shafron's argument for three reasons. First, it confirmed the trial judge's findings rejecting Mr Shafron's contention that Allens had been specifically retained to advise on the question of continuous disclosure of the DOCI (CA[999]-[1018] ABWhi/195.17-198.24). It also rejected his contention that Allens had a *"general retainer"* to advise, relevantly, on continuous disclosure matters in relation to the transaction (CA[1030] ABWhi/200.15). Thus the Court of Appeal rejected the factual basis for his contention that he had discharged his duty (CA[1030] ABWhi/200.22).

40. Second, the Court of Appeal rejected Mr Shafron's contention that he somehow relied on any silence of Allens noting, inter alia, that *"Mr Shafron did not give evidence. There is no basis upon which we can properly infer that he relied on the silence of Allens"* (CA[1033] ABWhi/200.39).

41. Third, the Court of Appeal found that Mr Shafron would not, in any event, have discharged his duty even if it had been established that Allens was required or could reasonably be expected to advise on disclosure of the DOCI Information (CA[1034]-[1036] ABWhi/200.46-201.17) in that he was, at a minimum, obliged to raise in his own right the issue of disclosure for consideration (CA[1035] ABWhi/201.1). The Court of Appeal found that he was not a *"mere conduit for the advice of external solicitors"* (CA[1032] ABWhi/200.38) and referred to a memo that he wrote to Mr Macdonald (CA[1026] ABWhi/199.35; ABBlu3/1120) dated 16 October 2000 concerning whether the continuous disclosure regime required that the Trowbridge estimates be disclosed to the market. In the memorandum, Mr Shafron conveyed the opinions of both Allens and himself on the topic and asked whether a *"more detailed advice"* from either himself or Allens was required (ABBlu3/1121M).

42. Part of the DOCI Information that was not disclosed was the put option. The significance of the non disclosure of the put option was made clear in the Court of Appeal's penalty judgment at CAPJ[103] ABWhi/268.25 in that it was a means by which the James Hardie group could separate its operating assets from the last remaining company within the group that had any exposure to asbestos claims, namely JHIL. The Court of Appeal found that the explanation for the contravention in relation to the DOCI was that Mr Shafron *"turned his mind"* to JHIL's continuous disclosure obligations *"but did not raise it with Mr Macdonald or the board for consideration*

because he did not wish the put option to become known in the market place" (CAPJ[86] ABWhi/261.21).

Mr Shafron's submissions

43. In his submissions, Mr Shafron restates his contention that the absence of advice from Allens that disclosure of the DOCI Information to the ASX was required obviated any need for him to take any of the three steps noted at [38] above (SS[65]-[67]). ASIC submits that this argument is inconsistent with the factual findings of the Court of Appeal and otherwise does not address the independent nature of the duty he owed to JHIL.

44. Mr Shafron asserts that *"[t]he question of disclosure of the DOCI, whether it be continuous disclosure to the ASX or other forms of disclosure required under the Corporations Law, was expressly raised with Allens on several different occasions"* (emphasis added) (SS[66(a)]). He refers to the communications evidenced by an email of 1 February 2001, an email of 4 or 5 February 2001 and some internal notes of a conference call with Allens dated 5 February 2001. To the extent that this submission seeks to suggest that the communications evidenced by those documents were or might have been a request to Allens to advise on the question of whether disclosure of the DOCI to the ASX was required, then it is directly inconsistent with both the findings of the trial judge (LJ[519]-[535] ABRed2/545N-549; LJ[561]-[563] ABRed2/557I-V) and the Court of Appeal (CA[976]-[977] ABWhi/190.43-192.25; CA[999]-[1034] ABWhi/195.17-200.51) and no ground of his Notice of Appeal seeks to overturn those findings.

45. Mr Shafron also seeks to rely on these documents as evidence that Allens were asked to address some form of *"disclosure"*, albeit disclosure to the incoming directors or the substantial shareholder provisions, and submits that a reasonable person would consider that it was incumbent upon Allens to advise in relation to all forms of disclosure (SS[66(a)]). The latter does not follow from the former. Neither a consideration of whether the DOCI was required to be disclosed to the incoming directors or was required to be disclosed under the substantial shareholder provisions required any assessment of the impact of disclosure upon the market price for JHIL's shares. In the absence of Allens either being provided with or having requested material addressing

that issue, a *"reasonable person"* in Mr Shafron's position could not have assumed that Allens' silence on disclosure to the ASX had any significance whatsoever. Further, the terms of Mr Shafron's memorandum of 16 October 2000 suggest that when advice on the topic of disclosure to the ASX was expected to be provided by Allens it followed from them being specifically requested to do so.

46. Next, Mr Shafron relies upon what he describes as *"the general nature of Allens' retainer"* (SS[66(b)]) and submits *"that a reasonable person would expect the firm to advise on all relevant aspects of the proposed transactions, including disclosure"* (presumably to the ASX). At SS[66(b)(i)-(vi)], he points to certain documents said to support the existence of the *"general nature of Allens' retainer"* that he asserts. This contention is inconsistent with the finding at CA[1030] ABWhi/200.15 that there *"is no evidence of a "general retainer" to advise, relevantly, on continuous disclosure obligations"* and no ground of his Notice of Appeal seeks to overturn that finding. Further the documents relied on by Mr Shafron at SS[66(b)(i) and (ii)] were addressed by the Court of Appeal at CA[1022]-[1025] ABWhi/198.47-199.34 and the Allens bills relied on at SS[66(b)(v)] were addressed by the Court of Appeal at CA[1029] ABWhi/200.12. In each case the Court of Appeal made findings inconsistent with Mr Shafron's submissions.

47. Otherwise, Mr Shafron's submissions do not address the Court of Appeal's finding at CA[1034] ABWhi/200.46 that, even if Allens could have been expected to have advised him as to whether disclosure of the DOCI Information was required, their failure to do so did not obviate his duty to JHIL to take one of the steps identified at [38] above. As found by the Court of Appeal he was not a *"mere conduit for the advice of external solicitors"* (CA[1032] ABWhi/200.37). Mr Shafron was a highly qualified and experienced legal practitioner (LJ[378] ABRed2/511S; CA[922] ABWhi/179.43). The trial judge emphasised his duty to protect JHIL against legal risks (LJ[398] ABRed2/517C; LJ[402]-[403] ABRed2/517P-518E). In his memorandum of 16 October 2000, Mr Shafron advised Mr Macdonald, who in turn advised the board, of both his and Allens' view on the topic of continuous disclosure. An assessment of whether JHIL's continuous disclosure obligations were triggered involved a mixture of legal and market considerations. Mr Shafron was in an equal if not superior position to Allens to assess them. Not only did he have extensive legal qualifications but, by virtue of his

position within JHIL, he was more likely to have a greater knowledge of factual matters concerning market perceptions of JHIL and its securities compared with Allens.

The Superimposed Inflation Contravention (SS[70] to [72])

48. For a number of years prior to 2001, the board of JHIL had received regular reports on asbestos litigation and costs. JHIL commissioned reports from Trowbridge estimating future asbestos liabilities for the two subsidiaries (CA[124] ABWhi/29.24) for both existing claims and claims to be made in the future (based on past exposure). Up until 2001, Trowbridge's estimates of the cost of the latter were considered to be subject to such uncertainty that they were not brought to account as a liability but instead only identified as a contingent liability in the notes to JHIL's annual accounts (CA[126] ABWhi/29.38).

49. Reports were prepared by Trowbridge in 1996 and 1998 (CA[125] ABWhi/29.32 and CA[127]-[128] ABWhi/29.42-30.11). During 2000, Trowbridge commenced preparing its next report (CA[129] ABWhi/30.12; CA[1064] ABWhi/206.24). A final report was never prepared but the latest version was a draft prepared in June 2000 (CA[129] ABWhi/30.12). In that report Trowbridge provided a *"most likely"* estimate of the ultimate cost of asbestos claims (ABBlu2/928L) and *"assumed no superimposed inflation"* (ABBlu2/931W-932E). The report also included a sensitivity analysis which demonstrated that if superimposed inflation of 4% (ie an overall inflation rate of the cost of claims of 8%) was present then the *"most likely"* estimate increased by $130 million or 44% (ABBlu2/962-964). Mr Shafron made attempts to have this report changed and specifically requested that the superimposed inflation rate in the sensitivity analysis be reduced from 4% to 3% (CA[1064] ABWhi/206.24).

50. In November 2000, two actuaries from Trowbridge, Messrs Watson and Hurst, made a presentation at a seminar suggesting that the previous industry models of exposure to asbestos claims were deficient and the current industry approach may lead to under reserving (CA[131] ABWhi/31.3; ABBlu3/1152).

51. On 17 January 2001, the board of JHIL rejected the *"net assets proposal"* for separation and consideration was then given to a separation proposal involving funding up the actuarial estimate (CA[91] ABWhi/23.47). On 19 January 2001, Trowbridge was asked to update the June 2000 draft report to take account of the study by Messrs Watson and

Hurst. Mr Shafron attended that meeting (CA[133] ABWhi/31.15). Shortly after that meeting, Mr Shafron sent a draft of a letter intended to be sent by Allens to Trowbridge confirming their retainer (ABBlu3/1420-1421). It was amended and sent to Trowbridge (ABBlu3/1422; CA[134] ABWhi/31.18). The draft prepared by Mr Shafron refers to the work in 2000 not having resulted in a final report *"for a number of reasons, including unresolved issues relating to the sensitivity analysis"*. By reference to the study undertaken by Messrs Watson and Hurst, Mr Shafron requested Trowbridge prepare a further report which, in Mr Shafron's draft was stated as being to *"assist this firm in providing strategic advice to James Hardie in its asbestos litigation"*. This was not reflected in Allens' final letter (ABBlu3/1422) but for present purposes it is sufficient to note that neither version of the letter indicated that the purpose of their report was for use in establishing a fixed amount to meet all future claims (ie a *"closed"* fund). Consistent with this, Mr Minty, the author of the Trowbridge report, gave evidence that if he had been asked to provide an estimate for a *"closed fund"* such as the Foundation, he would have adopted a different approach to the preparation of his report and taken into account superimposed inflation.[31]

52. Trowbridge provided the material in two forms. The first was a series of spreadsheets modelling the exposure to asbestos claims for 50 years in the future (**Trowbridge 50 Year Estimate**).[32] The second was in the form of a report which provided the same figures but only modelled for 20 years (**February 2001 Trowbridge Report**) (CA[137] ABWhi/32.2; ABBlu5/1936-1951). Both forms provided figures on a *"current"* basis (without adjustment for the work of Watson and Hurst), a *"best estimate"* (using the *"Berry medium"* pattern of exposure from Watson and Hurst) and a high basis (using one aspect of the *"Berry high"* pattern proposed by Watson and Hurst and another aspect of the Berry medium). The February 2001 Trowbridge Report made it clear that they were not undertaking a fresh analysis but were simply revisiting their June 2000 draft based on the Watson and Hurst analysis of claim numbers (and not claim costs) (ABBlu5/1937L). Further, Mr Shafron was aware that in preparing their report, Trowbridge had not been provided with the most recent claims data from JHIL, that being the topic of the telephone conversation he had with Messrs Macdonald, Robb and

[31] T121/11-24; T140/3-11.
[32] CA[136] ABWhi/31.42; ABBlu5/1875; (TROW.001.007.0265-0298); (AFFI.001.013.0001_M) at [37]-[41].

Peter Cameron from Allens on the morning of 15 February 2001 (LJ[328] ABRed2/497U; CA[340] ABWhi/70.36).

53. At the board meeting on 15 February 2001 Mr Shafron addressed the board concerning the Trowbridge material (CA[1073] ABWhi/207.47). The board also received a copy of a cashflow model which incorporated the figures from the Trowbridge 50 Year Estimate (CA[141] ABWhi/32.40). The model suggested that the funds being provided to the Foundation would be sufficient to meet the 50 year projected cash flows for the best estimate figure from the Trowbridge 50 Year Estimate (CA[140] ABWhi/32.26).

54. The Court of Appeal found, inter alia, that Mr Shafron:

(a) was acquainted with the concept of superimposed inflation and aware of its importance in estimating asbestos liabilities (CA[1068] ABWhi/206.49);

(b) was aware from the June 2000 draft report of the potential impact of superimposed inflation (CA[1068]-[1069] ABWhi/206.49-207.14);

(c) knew that the February 2001 Trowbridge Report did not allow for superimposed inflation as it was merely an update on the June 2000 report having regard to the revised claim numbers (not costs) that emerged from the Watson and Hurst study (CA[1068] ABWhi/206.49); and

(d) knew that, contrary to the assumption adopted by Trowbridge, JHIL's experience was that the cost of claims was increasing at a much higher rate than the general inflation rate (CA[1073] ABWhi/207.47).

55. None of these findings are challenged in Mr Shafron's Notice of Appeal.

The Court of Appeal's approach and Mr Shafron's submissions

56. Mr Shafron submits (SS71[(d)]) that *"ASIC's criticism of Mr Shafron cannot be that he failed to point out that a matter had not been included in the Trowbridge material that he knew should have been included"* and proceeds to recast ASIC's case. This approach misstates ASIC's case and the Court of Appeal's findings. The Court of Appeal found that Mr Shafron knew that JHIL was experiencing an increase in the cost of claims higher than the general inflation rate (CA[1073] ABWhi/207.47) whereas Trowbridge

had assumed to the contrary (CA[1068] ABWhi/206.47). Further, it found that this knowledge together with Mr Shafron's knowledge of the materiality of superimposed inflation to Trowbridge's estimates (CA[1068] ABWhi/206.47), which were in turn the basis for the board's decision to establish a closed fund, required Mr Shafron to specifically draw to the board's attention that Trowbridge had not made any allowance for superimposed inflation and that prudence warranted that an allowance should be made (CA[1073] ABWhi/207.47; CA[1071] ABWhi/207.25).

57. Mr Shafron's submissions also contend that there was no evidence to suggest that Mr Shafron should have been in a superior position to identify a *"flaw in the methodology of Trowbridge"* (SS[70](d)(i)) and that the Court of Appeal's findings amounted to a conclusion that Mr Shafron was obliged to *"second guess"* their methodology (SS[70(d)(iii)]). This misstates the Court of Appeal's reasoning. It specifically addressed a similar argument made to it at CA[1072]-[1073] ABWhi/207.37-208.10. The Court of Appeal simply found that Mr Shafron knew that JHIL's experience was that the cost of claims was increasing at a much higher rate than the general inflation rate, whereas Trowbridge had assumed it was not (CA[1073] ABWhi/207.47).

58. SS[71(d)(ii)] makes reference to the evidence of ASIC's expert, Dr Taylor, who accepted that the appropriate rate of superimposed inflation *"could conceivably have been zero"*. This part of Dr Taylor's evidence was addressed by the Court of Appeal at CA[1071] ABWhi/207.25. Further the reference to Mr Wilkinson's evidence needs to be placed in context. Consistent with the evidence of Mr Minty, he stated that an actuary who was specifically asked to look at a *"closed fund"* (ie a fund such as a foundation, with a specific amount of assets and cash to meet asbestos liabilities) would adopt a more conservative set of assumptions including in relation to superimposed inflation.[33]

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[33] T1784/5-22 ABBla3/1082D-L.

PART VII: ARGUMENT ON NOTICE OF CONTENTION OR CROSS-APPEAL

59. Not applicable.

Dated: 20 July 2011

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Corporations Law

As set out in section 82 of the *Corporations Act 1989*

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Chapter 7—Securities

Part 7.1—Interpretation

760 Effect of this Part

The provisions of this Part have effect for the purposes of this Chapter, except so far as the contrary intention appears in this Chapter.

761 Definitions

Unless the contrary intention appears:

authority, in relation to a government, includes an instrumentality or agency.

business rules, in relation to a body corporate, means:

(a) in the case of a body corporate that conducts, or proposes to conduct, a stock market—any rules, regulations or by-laws that are made by the body corporate, or that are contained in its constitution, and that govern:

(i) the activities or conduct of that stock market; or

(ii) the activities or conduct of persons in relation to that stock market;

other than rules, regulations or by-laws that are listing rules of the body corporate; and

(b) otherwise—the provisions of the constitution of the body corporate and any other rules, regulations or by-laws made by the body corporate.

comply with, in relation to the business rules or listing rules of a securities exchange, includes give effect to those rules.

eligible exchange means:

(a) the Exchange; or

(b) a securities exchange that is neither the Exchange nor an Exchange subsidiary.

listing rules, in relation to a body corporate that conducts, or proposes to conduct, a stock market, means rules, regulations or by-laws governing or relating to:

(a) the admission to, or removal from, the official list of the body corporate of bodies corporate, governments, unincorporate bodies or other persons for the purpose of the quotation on the stock market of the body corporate of securities of bodies corporate, governments, unincorporate bodies or other persons and for other purposes; or

(b) the activities or conduct of bodies corporate, governments, unincorporate bodies and other persons who are admitted to that list;

whether those rules, regulations or by-laws:

(c) are made by the body corporate or are contained in the constitution of the body corporate; or

(d) are made by another person and adopted by the body corporate.

marketable parcel, in relation to securities that are listed for quotation on the stock market of a securities exchange, means a marketable parcel of those securities within the meaning of the relevant business rules or listing rules of that securities exchange.

odd lot has the meaning given by section 763.

participating exchange means an eligible exchange that is a member of SEGC.

shares, in relation to a body corporate, includes units in shares in the body.

trading day, in relation to a stock exchange, means:

(a) in the case of the Exchange—a day on which a stock market of an Exchange subsidiary; or

(b) in any case—a day on which a stock market of the stock exchange;

is open for trading in securities.

trust account, in relation to a person, means, in the case of a person who holds, or has at any time held, a dealers licence, an

(c) by the reckless making or publishing (dishonestly or otherwise) of a statement, promise or forecast that is misleading, false or deceptive; or

(d) by recording or storing in, or by means of, any mechanical, electronic or other device information that the person knows to be false in a material particular or materially misleading;

induce or attempt to induce another person to deal in securities.

(3) It is a defence to a prosecution for a contravention of subsection (1) constituted by recording or storing information as mentioned in paragraph (1)(d) if it is proved that, when the information was so recorded or stored, the defendant had no reasonable grounds for expecting that the information would be available to any other person.

1001 Dissemination of information about illegal transactions

(1) A person shall not circulate or disseminate any statement or information to the effect that the price of any securities of a body corporate will or is likely to rise or fall or be maintained because of any transaction entered into or other act or thing done in relation to securities of that body corporate or of a body corporate that is related to that body corporate, in contravention of section 997, 998, 999 or 1000 if:

(a) the person, or an associate of the person, has entered into any such transaction or done any such act or thing; or

(b) the person, or an associate of the person, has received, or expects to receive, directly or indirectly, any consideration or benefit in respect of the circulation or dissemination of the statement or information.

1001A Continuous disclosure—listed disclosing entities

(1) This section applies to a listed disclosing entity if provisions of the listing rules of a securities exchange:

(a) apply to the entity; and

(b) require the entity to notify the securities exchange of information about specified events or matters as they arise for the purpose of the securities exchange making that information available to a stock market conducted by the securities exchange.

(2) The disclosing entity must not contravene those provisions by intentionally, recklessly or negligently failing to notify the securities exchange of information:

(a) that is not generally available; and

(b) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity.

(3) A contravention of subsection (2) is only an offence if the failure concerned is intentional or reckless.

(4) For the purposes of the application of this section to a listed disclosing entity that is an undertaking to which interests in a registered scheme relate, the obligation of the entity not to contravene provisions as mentioned in subsection (2) is an obligation of the reponsible entity.

1001B Continuous disclosure—unlisted disclosing entities

(1) If:

(a) an unlisted disclosing entity becomes aware of information:

(i) that is not generally available; and

(ii) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity; and

(b) the information is not required to be included in a supplementary disclosure document or a replacement disclosure document in relation to the entity;

the entity must, as soon as practicable, lodge a document containing the information.

(2) An unlisted disclosing entity does not contravene subsection (1) except by an intentional, reckless or negligent act or omission.

(3) A contravention of subsection (1) is only an offence if the failure concerned is intentional or reckless.

(4) For the purposes of the application of this section to an unlisted disclosing entity that is an undertaking to which interests in a registered scheme relate:

Immediate notice of material information

General rule

3.1 Once an entity is or becomes +aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's +securities, the entity must immediately tell ASX that information. This rule does not apply to particular information while each of the following applies.

Note: Section 1001D of the Corporations Law defines material effect on price or value. As at 1/7/96 it said for the purpose of section 1001A a reasonable person would be taken to expect information to have a material effect on the price or value of securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell, the first mentioned securities.

3.1.1 A reasonable person would not expect the information to be disclosed.

3.1.2 The information is confidential.

3.1.3 One or more of the following applies.

(a) It would be a breach of a law to disclose the information.

(b) The information concerns an incomplete proposal or negotiation.

(c) The information comprises matters of supposition or is insufficiently definite to warrant disclosure.

(d) The information is generated for the internal management purposes of the entity.

(e) The information is a trade secret.

Introduced 1/7/96. Origin: Listing Rule 3A(1). Amended 1/7/2000.

Examples: The following information would require disclosure if material under this rule:

- a change in the entity's financial forecast or expectation.
- the appointment of a receiver, manager, liquidator or administrator in respect of any loan, trade credit, trade debt, borrowing or securities held by it or any of its child entities.
- a transaction for which the consideration payable or receivable is a significant proportion of the written down value of the entity's consolidated assets. Normally, an amount of 5% or more would be significant, but a smaller amount may be significant in a particular case.
- a change in the control of the responsible entity, management company or the trustee of a trust.
- a proposed change in the general character or nature of a trust.
- a recommendation or declaration of a dividend or distribution.
- a recommendation or decision that a dividend or distribution will not be declared.
- under subscriptions or over subscriptions to an issue.
- a copy of a document containing market sensitive information that the entity lodges with an overseas stock exchange or other regulator which is available to the public. The copy given to ASX must be in English.

+ See chapter 19 for defined terms.

- an agreement or option to acquire an interest in a mining tenement, including the number of tenements, a summary of previous exploration activity and expenditure, where the tenements are situated, the identity of the vendor and the consideration for the tenements. Cross reference: Appendix 5B, which requires this information quarterly, regardless of disclosure because of its materiality.
- information about the beneficial ownership of shares obtained under Part 6.8 of the Corporations Law.
- giving or receiving a notice of intention to make a takeover.
- an agreement between the entity (or a related party or subsidiary) and a director (or a related party of the director).

Cross reference: Appendix 6A, ASX Guidance Note on continuous disclosure.

Notice of specific information

Entity making a takeover bid

3.2 If an entity, or one of its +child entities, extends the offer period under a takeover bid, the entity must immediately tell ASX the following information.

3.2.1 The percentage of +securities in the bid class in which the bidder and the bidder's associates had a relevant interest when the first of the offers was made.

3.2.2 The percentage of +securities in the bid class in which the bidder and the bidder's associates have a relevant interest at the date of the extension.

Introduced 1/7/96. Origin: Listing Rule 3R(7). Amended 13/3/2000.

Note: At 13/3/2000, section 9 of the Corporations Law says that the bid class of securities for a takeover bid is the class of securities to which the securities being bid for belong.

3.3 If an entity, or one of its +child entities, is making a takeover bid, the entity must tell ASX the following information. It must do so at least half an hour before the commencement of trading on the +business day following the end of the offer period for the takeover bid.

Introduced 1/7/96. Origin: Listing Rule 3R(8). Amended 1/7/97, 13/3/2000.

3.3.1 The percentage of +securities in the bid class in which the bidder and the bidder's associates have a relevant interest.

Introduced 1/7/96. Origin: Listing Rule 3R(8)(a). Amended 13/3/2000.

3.3.2 Whether compulsory acquisition will proceed.

Introduced 1/7/96. Origin: Listing Rule 3R(8)(b).

Cross reference: rules 17.4, 17.11, 17.14, Section 16 SCH Business Rules.

Note: At 13/3/2000, section 9 of the Corporations Law says that the bid class of securities for a takeover bid is the class of securities to which the securities being bid for belong.

+ See chapter 19 for defined terms.