ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

On appeal from a decision of the New South Wales Court of Appeal

No. S174 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **PETER JAMES SHAFRON** Respondent	**No. S175 of 2011** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **GREGORY JAMES TERRY** Respondent
No. S176 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MEREDITH HELLICAR** Respondent	**No. S177 of 2011** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MICHAEL ROBERT BROWN** Respondent
No. S178 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MICHAEL JOHN GILLFILLAN** Respondent	**No. S179 of 2011** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MARTIN KOFFEL** Respondent
No. S180 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **GEOFFREY FREDERICK O'BRIEN** Respondent	**No. S181 of 2011** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **PETER JOHN WILLCOX** Respondent

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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 appellant contends that the appeals present the following issues:

   (a) whether in civil penalty proceedings ASIC is subject to an obligation of fairness which can be breached by a failure to call a particular witness. If so, what is the content and scope of the obligation, and what are the consequences of non-compliance;

   (b) whether the New South Wales Court of Appeal erred in concluding that the failure to comply with the obligation of fairness which it had found was imposed on ASIC had a negative evidentiary impact on the cogency of ASIC's contention that the board of James Hardie Industries Limited (**JHIL**) passed the Draft ASX Announcement Resolution;

   (c) whether the Court of Appeal erred in finding that it was not satisfied that, at the meeting of the board of JHIL on 15 February 2001, the non-executive directors voted in favour of the Draft ASX Announcement Resolution; and

   (d) whether the Court of Appeal erred in concluding that the declarations of contravention in respect of the Draft ASX Announcement concerning each of the respondents made by the trial judge should be set aside.

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

3. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) (***Judiciary Act***), and concluded that it is not necessary.

PART IV: CITATIONS

4. The primary judge's decision on liability is reported at (2009) 256 ALR 199 (**LJ**). The primary judge's decision on penalty is reported at (2009) 259 ALR 116 (**PJ**).

5. The New South Wales Court of Appeal's decision on liability is reported at (2011) 274 ALR 205 (**CA**). The medium neutral citation for the Court of Appeal's subsequent decision on 6 May 2011 concerning the balance of Mr Shafron's appeal and ASIC's cross-appeal in relation to Mr Shafron is [2011] NSWCA 110.

PART V: FACTS

Brief overview

6. As at February 2001, JHIL was the ultimate holding company of the James Hardie group, and was listed on the Australian Stock Exchange (**ASX**). Two subsidiaries of JHIL, James Hardie & Coy Pty Ltd (**Coy**) and Jsekarb Pty Ltd (**Jsekarb**), had incurred

liabilities to persons who suffered from asbestos related diseases from manufacturing activities undertaken in the past.

7. At a meeting held on 15 February 2001, the board of JHIL resolved to adopt a restructuring proposal to separate Coy and Jsekarb from the rest of the James Hardie group (**separation proposal**). The persons physically present at the meeting included the CEO (Mr Macdonald), the CFO (Mr Morley), the company secretary and general counsel (Mr Shafron), the Chairman (Mr McGregor, now deceased), two representatives of JHIL's lawyers, Allens (Mr David Robb and Mr Peter Cameron, now deceased), two corporate advisers from UBS Warburg (Messrs Wilson and Sweetman) and five non-executive directors (Ms Hellicar and Messrs Brown, Terry, O'Brien and Willcox). Two USA based non-executive directors, Messrs Gillfillan and Koffel, participated by telephone.

8. The separation proposal involved the transfer of Coy and Jsekarb to the Medical Research and Compensation Foundation (**MRCF**) by the cancellation of JHIL's shareholding in Coy (renamed Amaca Pty Ltd) and Jsekarb (renamed Amaba Pty Ltd), and the issuing of shares by Jsekarb to Coy and by Coy to the MRCF. The assets available to satisfy the asbestos liabilities of Coy and Jsekarb were the net assets of those companies and the amounts payable under a Deed of Covenant and Indemnity entered into by JHIL, Coy and Jsekarb (**DOCI**).

9. On 16 February 2001, JHIL announced the separation proposal along with its results for the third quarter of the financial year ending March 2001. JHIL issued an announcement to the ASX and the media describing the proposal (**Final ASX Announcement**). The Final ASX Announcement made a number of statements as to the sufficiency of funding being made available for asbestos liabilities. The trial judge found these statements to be misleading (LJ[629]-[638] ABRed2/574T-577P). Those findings were not disturbed by the Court of Appeal.

10. The minutes of the 15 February 2001 board meeting were adopted by each of the director respondents (other than Mr Willcox), the Chairman and the CEO at the meeting of the board held 3-4 April 2001. They were later signed by the Chairman (LJ[53] ABRed2/412K; CA[467] ABWhi/93.31). The minutes record that an ASX announcement was tabled, and the board resolved to approve it and authorise its execution and sending to the ASX. The terms of the minutes as approved by the board were the foundation of ASIC's pleaded case. The findings of the trial judge and the Court of Appeal concerning the minutes are addressed below at [80] to [91].

11. ASIC contended, and the trial judge found, inter alia, that:

    (a) a draft of an ASX announcement was taken to the 15 February 2001 board meeting by JHIL's communications manager, Mr Greg Baxter (LJ[193]-[194] ABRed2/460J-T). This finding was upheld by the Court of Appeal (CA[383] ABWhi/78.20);

    (b) Mr Baxter took the version described by the Court of Appeal as *"the 7.24am draft announcement"* (**Draft ASX Announcement**), being the version attached to an email sent by him at 7.24am on the morning of 15 February 2001 (without certain text boxes indicating amendments), to the board meeting (LJ[220]

ABRed2/467D). This finding was upheld by the Court of Appeal (CA[383] ABWhi/78.20);

(c) at the board meeting, the Draft ASX Announcement was distributed to each board member who was physically present, as well as to Messrs Cameron and Robb (LJ[220] ABRed2/467D). The Court of Appeal upheld the finding of distribution to Messrs Cameron and Robb, and otherwise did not overturn this finding (CA[383] ABWhi/78.20);

(d) each member of the board voted in favour of a resolution approving the Draft ASX Announcement (LJ[224] ABRed2/468C) (**Draft ASX Announcement Resolution**). This finding was overturned by the Court of Appeal (CA[796] ABWhi/147.45), and as a consequence the Court overturned the findings that each of the respondents contravened s 180(1) of the *Corporations Act* 2001 (Cth) (***Corporations Act***) (CA[804] ABWhi/151.19, [858] ABWhi/162.11; [931] ABWhi/181.42);

(e) the Draft ASX Announcement was a "*key statement in relation to a highly significant restructure of the James Hardie Group*" (LJ[260] ABRed2/479V; LJ[333] ABRed2/499M), and a misleading statement on the topic of funding risked legal action for JHIL, as well as adverse market reaction and reputational damage (LJ[259] ABRed2/479Q). The Court of Appeal made similar findings (CA[808] ABWhi/152.25 and CA[820] ABWhi/155.42);

(f) the Draft ASX Announcement conveyed a number of statements that were misleading in relation to the sufficiency of funding for asbestos claims, and each of the directors knew (or ought to have known) that it was misleading in those respects (LJ[318] ABRed2/495H, LJ[321] ABRed2/496F, LJ[325] ABRed2/497D, PJ[78] ABRed3/765M). On the assumption that the directors voted in favour of the Draft ASX Announcement Resolution, the Court of Appeal upheld this finding (CA[831] ABWhi/157.45);

(g) by voting in favour of the Draft ASX Announcement Resolution, each of Ms Hellicar and Messrs Brown, Terry, O'Brien and Willcox breached s 180(1)[1] (LJ[335]-[336] ABRed2/500C-M). On the assumption the board voted in favour of the Draft ASX Announcement Resolution, the Court of Appeal upheld this finding (CA[831] ABWhi/157.48);

(h) in the case of Messrs Gillfillan and Koffel, in the absence of these directors having a copy of the Draft ASX Announcement, each contravened s 180(1) by failing to familiarise himself with the Draft ASX Announcement or, failing that, by abstaining from voting in favour of the resolution (LJ[337] ABRed2/500P; PJ[57] ABRed3/760R).[2] On the assumption that the Draft ASX Announcement Resolution was passed, the Court of Appeal upheld this finding (CA[868] ABWhi/163.47); and

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[1] As pleaded in [119(b)(i)] of the Fourth Further Amended Statement of Claim (**FFASOC**) ABRed1/235I.
[2] As pleaded in FFASOC[119(b)(viii)] ABRed1/236B.

(i) by failing to advise the board that the Draft ASX Announcement was expressed in too emphatic terms concerning the adequacy of funding, Mr Shafron contravened s 180(1) (LJ[406] ABRed2/518P).[3] On the assumption that the board passed the Draft ASX Announcement Resolution, the Court of Appeal upheld this finding (CA[940] ABWhi/184.7).

12. In the penalty judgment, the trial judge declined to relieve any of the respondents from liability under s 1317S of the *Corporations Act,* and imposed disqualification orders and pecuniary penalties. The Court of Appeal did not address any of the grounds of appeal of the non-executive directors concerning the penalty judgment. The Court of Appeal allowed Mr Shafron's appeal against the declaration of contravention concerning the Draft ASX Announcement and another contravention (for unrelated reasons), but dismissed his appeal from a third contravention found by the trial judge and partially upheld a cross-appeal by ASIC from certain parts of its case that were dismissed by the trial judge. In the result, Mr Shafron was found to have contravened s 180(1) in two respects. The 6 May 2011 judgment addresses the appropriate period of disqualification and penalty arising out of these two contraventions.

Importance of the funding message

13. The objective of achieving a separation between the operating assets of the James Hardie group of companies and the corporate entities that had incurred asbestos liabilities had been under consideration by JHIL's board and management for a considerable period (LJ[80] ABRed2/420P, CA[52]-[55] ABWhi/15.17-15.46, CA[808] ABWhi/152.25). Coy and Jsekarb were perceived as "*something of a millstone*", and there was a concern that by one means or another JHIL might be visited with asbestos liabilities (CA[52] ABWhi/15.18). The board papers and presentations throughout 2000 "*spoke extensively of the adverse impact*" of the group's exposure to asbestos claims (CA[57] ABWhi/16.01), and showed a "*keen awareness*" that the success of any separation proposal depended upon the reaction of "*stakeholders*" (CA[59] ABWhi/16.27), specifically their reaction to the sufficiency of available funding (CA[59] ABWhi/16.27; CA[808] ABWhi/152.32).

14. The trial judge and the Court of Appeal found that by February 2001, the directors were well aware of the importance of communication to stakeholders of sufficiency of funding of any separation proposal (CA[59]-[61] ABWhi/16.26-17.20, CA[820] ABWhi/155.38, LJ[396]-[397] ABRed2/516I-X), and that a perceived insufficiency could result in legislative action imposing liability upon JHIL, regardless of the separation and regardless of JHIL's own liability (CA[65]-[66] ABWhi/18.15-18.29).

15. The board papers for the 17 January 2001 meeting recommended the pursuit of asbestos separation by the establishment of a trust holding Coy and Jsekarb, and only their existing assets being made available to meet their asbestos liabilities (CA[74] ABWhi/19.35; LJ[86] ABRed2/422B) (**the net assets proposal**). The board paper for the 17 January meeting included a draft ASX announcement announcing the net assets proposal (CA[84]-[90] ABWhi/22.09-23.44; LJ[87] ABRed2/422Q).

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[3] As pleaded in FFASOC [106(b)(ii) and (iii)] ABRed1/224C-F.

16. The board rejected the net assets proposal at its 17 January 2001 meeting, in part because it would not be well received by stakeholders (CA[99] ABWhi/25.31). Stakeholder reaction was in the directors' minds (CA[99] ABWhi/25.31). Mr Willcox agreed that part of his duty was to assess public reaction to the announcement (LJ[179] ABRed2/456F; CA[92] ABWhi/24.08).

Preparation of an announcement for the February 2001 board meeting

17. A draft communications strategy prepared in early February 2001 recorded that the board raised concerns at its 17 January 2001 meeting about whether the communications strategy presented at the meeting (which did not assert full funding (CA[87] ABWhi/23.20, CA[90] ABWhi/23.40)) "*would be able to neutralise potential stakeholder opposition effectively*" (CA[74] ABWhi/19.33, CA[81] ABWhi/21.40, CA[99] ABWhi/25.31). A management preliminary work plan prepared on 22 January 2001 stated "*following the January Board meeting*" and "*press release to be workshopped prior to the next Board meeting GB, PJS*".[4]

18. The pre-meeting board papers for 15 February 2001 which recommended the establishment of the MRCF for announcement on 16 February 2001 (CA[103]-[104] ABWhi/26.11-26.19) included communication strategy documents which did not convey a message of certainty of funding (CA[105] ABWhi/26.21, CA[112]-[118] ABWhi/27.22-28.37). There was no draft announcement, but work was said to be being done on one, along with funding work (LJ[91]-[92] ABRed2/424J-W).

19. The announcement was being drafted late on 13 February 2001 (CA[187] ABWhi/40.37), with a deadline for completion on 14 February 2001 (CA[188] ABWhi/40.44 LJ[98] ABRed2/426I). At 7.28pm on 14 February 2001, a draft announcement was prepared which asserted there was full funding for all asbestos claims (CA[189]-[197] ABWhi/40.46-44.34). Thereafter, the various iterations of the draft announcement (as well as the Final ASX Announcement) maintained and emphasised the message of full funding (CA[190]-[218] ABWhi/41.01-50.03).

PART VI: ARGUMENT

20. At trial, ASIC's case was principally documentary. ASIC relied on the minutes of the 15 February 2001 meeting, as drafted under the supervision of Mr Robb, reviewed by senior management including Mr Shafron and then Mr Robb, approved by the board at its April 2001 meeting and signed off by the Chairman, as overwhelming support for its case.

21. ASIC called two witnesses who attended the board meeting on 15 February 2001, Mr Baxter and the financial controller, Mr Harman. Although Mr Baxter's evidence was important on a number of issues, neither he nor Mr Harman had any express recollection of the events at the meeting concerning the passing of a resolution in relation to an ASX announcement (LJ[130] ABRed2/443O, LJ[141] ABRed2/447D). Prior to the trial, ASIC had indicated that it proposed to call evidence from a number of Allens witnesses including Mr Robb, although it did not have any statements from

[4] ABBlu3/1406-1407.

them, and Messrs Wilson and Sweetman from UBS. During the trial, ASIC advised the defendants that it would not call any witnesses from Allens, including Mr Robb, but would maintain subpoenas directed to them if any of the defendants wished to call them (CA[661] ABWhi/124.20). The circumstances surrounding ASIC not calling Mr Robb are addressed by the Court of Appeal at CA[645]-[677] (ABWhi/122.02-126.18), and are further addressed below at [60] to [61].

22. The Court of Appeal overturned the trial judge's approval finding, and concluded that it was not satisfied that the directors had voted in favour of the Draft ASX Announcement Resolution (CA[796] ABWhi/147.40). The Court found that ASIC owed an "*obligation of fairness*" which required it to call Mr Robb, and that its failure to do so meant that the "*cogency*" of its case suffered (see CA[729] ABWhi/136.23; CA[756] ABWhi/141.12; CA[766] ABWhi/142.43; CA[777] ABWhi/144.28). ASIC contends that the Court erred in so doing. This is addressed below at [24] to [76]. In summary, ASIC:

    (a) does not dispute that it has an obligation to conduct proceedings fairly and, in particular, in accordance with the model litigant obligation contained in the *Legal Services Directions* issued under s 55ZF of the *Judiciary Act*; and

    (b) contends, however, that the model litigant obligation is qualitatively different from the obligation identified by the Court of Appeal, and says nothing about the calling of material witnesses or matters of proof in civil proceedings.

23. ASIC further contends that, if the Court of Appeal's reasons in relation to the obligation of fairness and the calling of Mr Robb are overturned, then its setting aside of the approval finding falls away, and that finding should be restored. ASIC relies on the minutes as powerful evidence to support its case that the board passed the Draft ASX Announcement Resolution (see [80] to [91] below). To the extent that other aspects of the Court of Appeal's reasons might be said to be a basis for interfering with the approval finding and for doubting the finding that the Draft ASX Announcement was distributed and tabled (or even if the Court of Appeal's reasons in relation to the failure to call Mr Robb were upheld), they are addressed at [92] to [136] in relation to ASIC's remaining grounds of appeal.

COURT OF APPEAL ERRED IN ENUNCIATING AN OBLIGATION OF FAIRNESS, AND IN ITS APPLICATION TO PARTICULAR WITNESSES (GROUNDS 2 to 5, and 11)

The respondents' submissions before the trial judge and the Court of Appeal concerning witnesses not called by ASIC

24. At trial, no submission was made by any party that ASIC had an "*obligation of fairness*" which required it to call Mr Robb. It was only formally submitted on behalf of Mr Terry that ASIC had the same duty as a prosecutor in a criminal trial to call material witnesses, and Mr Terry sought a stay on that basis. Consistent with *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1 (***Adler***), the application was refused. Otherwise, the respondents' submissions concerning ASIC's failure to call Mr Robb (and Messrs Wilson and Sweetman) sought to invoke the principles in *Jones v Dunkel* (1959) 101 CLR 298 and those in *Whitlam v ASIC* (2003) 57 NSWLR 559 (***Whitlam***) at [119]) concerning the need for diligence in calling available evidence in order to satisfy the *Briginshaw v Briginshaw* (1938) 60 CLR 336 standard.

25. At LJ[207] (ABRed2/464E) the trial judge concluded that each of Messrs Robb, Sweetman and Wilson remained in the camp of the respondents or at least in the camp of the 11th defendant, JHIL and not in ASIC's camp (LJ[1141]; ABRed2/710U). His Honour made findings on each of the issues raised in the proceedings without the need to draw a *Jones v Dunkel* inference (LJ[1137]-[1146] (ABRed2/709G-712G).

26. Before the Court of Appeal, the respondents submitted (CA[642]-[643] ABWhi/121.20-121.39) that the trial judge erred in failing to draw *Jones v Dunkel* inferences against ASIC by reason of its failure to call Mr Robb, and Messrs Wilson and Sweetman, and restated their reliance on *Whitlam*. Further, Mr Terry appealed against the refusal of the trial judge to grant a stay based on ASIC owing a duty of a prosecutor, and submitted that *Adler* was no longer good law (CA[643] ABWhi/121.31).

27. The submission that ASIC owed an "*obligation of fairness*" which required it to call, inter alia, Mr Robb was first made during oral submissions on behalf of Mr Terry before the Court of Appeal.[5] Those submissions were not specifically adopted by any other party.[6]

The reasons of the Court of Appeal

28. The Court of Appeal did not overturn the trial judge's refusal to draw a *Jones v Dunkel* inference adverse to ASIC from its decision not to call Mr Robb (and Messrs Wilson and Sweetman) (CA[731] ABWhi/136.35). The Court noted that a *Jones v Dunkel* inference concerning the failure to call Messrs Robb, Wilson and Sweetman *"would not* [in any event] *be of high, let alone determinative, significance."*

29. The Court also held that ASIC was not under any prosecutorial duty to call Mr Robb (CA[678] ABWhi/126.20). The Court considered (CA[689] ABWhi/128.10) that the analysis in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 (***Rich***) was contrary to any proposition that it was appropriate to reason "*by analogy*" from criminal procedure to civil penalty proceedings.

30. However, the Court found what it described as a *"middle ground"* (CA[705] ABWhi/130.48). It held that ASIC had an obligation of fairness which could be breached by a failure to call a particular witness (CA[728] ABWhi/136.17). The consequence of a breach of that obligation was that the *"case of the party in default suffers in its cogency"*, making it more difficult for *"the tribunal of fact to reach an affirmative conclusion"* in its favour (CA[753] ABWhi/140.29).

31. The Court held that there was such a breach by ASIC in relation to its failure to call Mr Robb, with a consequential effect on the cogency of ASIC's case (CA[757]-[766] ABWhi/141.16-142.45) concerning the passing of the Draft ASX Announcement Resolution (CA[775]-[777] ABWhi/144.04-144.31). In particular, the Court found that

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[5] Court of Appeal transcript day 3 at T227/6 to day 4 at T244/13 and day 9 at T716-718.

[6] Without any elaboration, senior counsel for Ms Hellicar and Messrs Brown, Gillfillan and Koffel "*adopt*[ed] *what Mr McHugh* [Mr Terry's counsel] *said regarding the fair trial*": Court of Appeal transcript day 8 at T660/15.23. In reply submissions, senior counsel for Mr Shafron referred to a number of the factors relied on by the Court of Appeal in the context of "*weighing all evidence according to the capacity of the parties to have adduced* it": Court of Appeal transcript day 9 at T722/14-T725/5 esp at T724/11-14.

Mr Robb would *"probably have knowledge"* (CA[766] ABWhi/142.43) of the issues identified in CA[758] (ABWhi/141.18), which included whether a resolution was passed at the 15 February 2001 board meeting. The majority concluded that there was no breach in relation to Messrs Sweetman and Wilson on the basis that they only had a *"tangential involvement"* in the determination of the content of the press release (CA[768] ABWhi/142.48).

32. The matters upon which the Court relied as supporting the existence of an "*obligation of fairness"* were:

(a) the body of cases dealing generally with the Crown's obligation as a model litigant (CA[702]-[706] ABWhi/130.11-131.14);

(b) the necessity to ensure that there had been a fair trial, and the attributes of such a trial (CA[707]-[716] ABWhi/131.15-132.45); and

(c) the various statutory provisions concerning ASIC's powers and obligations (CA[718]-[727] ABWhi/133.05-136.16).

33. According to the Court of Appeal, the cumulative effect of these matters was that ASIC cannot be regarded as an ordinary civil litigant when it commences proceedings (CA[728] ABWhi/136.17). Critical to this reasoning was the following observation as to the rationale for the obligation (at CA[717] ABWhi/132.46):

> *"... in such a context the usual rules and practices of the adversary system may call for modification. The most significant modification, likely to be true of most regulatory regimes, is that the public interest can only be served if the case advanced on behalf of the regulatory agency does in fact represent the truth, in the sense that the facts relied upon as primary facts actually occurred. It is not sufficient for the purposes of, at least, most regulatory regimes that, in accordance with civil laws of evidence and procedure in an adversary system, one party has satisfied the court of the existence of the relevant facts. The strength and quality of the evidence advanced on behalf of the State is a material consideration, which has received acknowledgment in the case law."* (emphasis added)

Summary of ASIC's submissions

34. The matters upon which the Court of Appeal relied to conclude that ASIC was subject to an obligation of fairness of a kind which could require it to call a particular witness do not support its conclusion. ASIC submits that:

(a) the Court of Appeal's approach is inconsistent with the statutory scheme in the *Corporations Act*, and especially s 1317L;

(b) the approach is inconsistent with the historical development of civil penalty proceedings (in the context of which the penalty privilege has applied to prevent a defendant from being required to assist a plaintiff to prove its case);[7]

(c) while it is accepted that ASIC, as a model litigant, is subject to an obligation to conduct proceedings fairly, the model litigant standard is qualitatively different from the obligation identified by the Court of Appeal and says nothing about the calling of witnesses or matters of proof in civil proceedings;

(d) neither the attributes of a fair trial nor anything that occurred in relation to Mr Robb, in particular, warrants the modification of the adversary system, nor a conclusion that ASIC was required to call him as a matter of fairness;

(e) the effect of the Court of Appeal's approach was to impose on ASIC something either akin to or more onerous than a prosecutorial duty to call all material witnesses;

(f) there is no proper basis for importing the notion of an *"obligation of fairness"* as part of the *Briginshaw* analysis and concluding that ASICs case suffered in its cogency; and

(g) the Court of Appeal's approach creates uncertainty as to the scope of the obligation of fairness which it found to exist and how that obligation can be discharged.

(a) The statutory scheme

35. In its analysis of the statutory scheme (CA[718]-[727] ABWhi/133.05-136.16), the Court of Appeal makes no reference to s 1317L of the *Corporations Act* which provides that the Court "*must apply the rules of evidence and procedure for civil matters*" when hearing civil penalty proceedings.

36. ASIC submits that Parliament has made a clear choice in s 1317L that ASIC is to pursue civil penalty proceedings, as an alternative to criminal proceedings, in accordance with the rules of evidence and procedures for civil matters. This reflects a legislative choice to adopt an adversarial trial according to the civil standard of proof in s 140(2) of the *Evidence Act*. To say, as the Court of Appeal did, that the adversary system requires modification so that the *"truth"* can be advanced is to undermine the legislative choice as to how the truth is to be established in civil penalty proceedings. That is, by the adoption of an adversarial system in which each party makes decisions about the witnesses it will call.[8]

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[7] The approach is also inconsistent with the Court of Appeal's earlier reasoning in *Adler* and the decisions that followed it, including *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1; (2009) 75 ACSR 1 (***Rich***) (Austin J). The relevant case law is set out by Austin J at [531]-[557].

[8] In 2005, the Australian Law Reform Commission (**ALRC**) recommended that the "*usual practice and procedure* " of the courts in civil proceedings should apply to civil penalty proceedings: ALRC 95, *Principled Regulation: Civil and Administrative Penalties in Australian Federal* Regulation, Pt A, Ch 3, "The Purpose of Penalties" Recommendation 3-1 (page 120).

37. Otherwise, the Court of Appeal's analysis of ASIC's enforcement powers does not support its conclusion (CA[723]-[728] ABWhi/133.49-136.22). Only one aspect of the statutory provisions considered by the Court of Appeal gave ASIC any advantage or power in the course of the litigation that was not available to the other parties, namely s 1317R. Section 1317R enables ASIC to invoke *"reasonable assistance"* from any person in the conduct of a proceeding for a declaration of contravention of a civil penalty provision or for a pecuniary penalty order. This provision was not available to be invoked against Mr Robb because he had been a lawyer for two of the defendants, namely JHIL and JHINV (see s 1317R(5)).

10 38. Each of the United Kingdom, United States, Canada and New Zealand has legislation containing similar civil penalty provisions to those in the *Corporations Act*.[9] In each of these jurisdictions, civil rules of procedure and evidence apply.[10] In none of the statutory regimes is there any provision requiring a regulator[11] to call particular witnesses in civil penalty proceedings. Nor as far as ASIC is aware do any of the cases decided in those jurisdictions suggest any such obligation.

(b) Civil penalty proceedings, the penalty privilege, and the "*criminal/civil*" distinction

39. Consistent with the decision in *Rich* at [19]-[20], as at the date of trial s 1317L required the application of the penalty privilege which the respondents invoked to the fullest extent.[12] However, ASIC submits that nothing in the nature of civil penalty proceedings
20 or in the penalty privilege warrants the *"modification"* of the *"usual rules and practices of the adversary system"* (cf CA[717] ABWhi/132.46).

40. The historical antecedents of civil penalty proceedings are in actions brought by common informers. In fourteenth century England, enforcement of national legislation was not a priority for local officials[13], and enforcement by private persons was adopted by Parliament to police compliance with regulatory requirements.[14] Common informers could bring an action for a penalty either by civil or criminal process.[15] Civil proceedings were generally used in relation to enactments regulating economic

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[9] Examples are *Financial Services and Markets Act 2000* (UK); c 8, s 123 *Securities Act* R.S.O. 1990, c. S-5 [*OSA*] s 127 *Securities and Exchange Act 1934,* 15 U.S.C s 21A; and *Securities Markets Act 1988* (NZ) s 42R.

[10] *Financial Services and Markets Act 2000* (UK); c8, s 129 *Securities and Exchange Act 1934* (USA); *Securities Act* R.S.O.1990, c. S-5 [*OSA*] s 128; and *Securities Markets Act* 1988 (NZ) s 42ZI.

[11] Relevantly, the US Securities and Exchange Commission, the United Kingdom Financial Services Authority, the Ontario Securities Commission, and the New Zealand Financial Markets Authority.

[12] For example, *Macdonald v Australian Securities and Investments Commission* (2007) 73 NSWLR 612 in relation to the filing of defences.

[13] Beck J R, "The False Claims Act and the English eradication of *qui tam* legislation" (1999-2000) 78 *North Carolina Law Review* 539 at 567; also see generally, Beresford MW, *"The Common Informer, the Penal Statutes and Economic Regulation", The Economic History Review,* New Series, Vol 10, No 2 (1957) 220.

[14] Blackstone described actions brought by common informers as follows: *"...more usually, these forfeitures created by statute are given at large, to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called popular actions, because they are given to people in general. Sometimes one part is given to the king, to the poor or to some public use, and the other part to the informer or prosecutor; and then the suit is called a qui tam action, because it is brought by a person qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur."* Blackstone W, *Commentaries on the Laws of England,* University of Chicago Press edition, 1979, Vol 3 at 160.

[15] See for example, 29 Geo 2 C 23 ¶ 12 (1756); and Blackstone *supra* Vol 3 at 160, Vol 4 at 303.

activity[16], and criminal process reserved for "*gross and notorious misdemeanours, riots, batteries, libels and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example deserve the most public animadversion*".[17]

41. In Tudor times, the practices of common informers fell into disrepute as informers were accused of engaging in fraudulent practices such as unlicensed compositions, making fraudulent and malicious accusations, and selecting inappropriate venues and defendants.[18] The courts increasingly refused to allow their processes to be used in aid of the common informer, and legislation was introduced to curb the excesses of common informers.[19]

42. Upon Federation, the use of civil penalties by means of civil procedure was adopted in Australia beginning with the *Customs Act 1901* (Cth).[20] While penalty privilege in relation to civil penalties had developed in the context of actions by common informers, in Australia the Crown was found to be in the same position in bringing civil penalty actions. In *The King v Associated Northern Collieries* (1910) 11 CLR 738 Isaacs J, in a frequently cited passage, said at 744 of an argument that the Crown had a right of discovery not afforded to the common informer because it acted purely in the public interest that "*the Court does not ask who the prosecutor is likely to be, and then distinguish according as it is the Attorney-General or a common informer.*" His Honour concluded at 747: "*Plainly then it is the result to the defendant, and not the personnel of the plaintiff, that affects the determination of the Court.*"[21]

43. Following the enactment of the *Customs Act 1901*, the use of civil penalties by means of civil procedure was adopted in a range of federal legislation, including the *Conciliation*

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[16] For example, 21 Jas I c 4 concerned civil penalties in relation to *inter alia* customs frauds, illegal exports of gold, silver, powder, munitions, wool, woolfells and leather; also Beresford *supra* at 221-222.

[17] Blackstone *supra* Vol 4 at 304. Examples of economic regulation include enactments regulating the oversupply of lawyers in the city of Norwich and counties of Norfolk and Suffolk (34 Hen 6, C. 7 (1455) cited by Beck *supra* at 571); prohibiting the use of aspe timber in making patens or clogs (4 Hen 5 C 3 (1416) cited by Beck J R *supra* at 571); and the regulation of Scottish fisheries providing for customs officers to act as *qui tam* informers (29 Geo. 2 C 23 ¶¶12, 17 (1756)).

[18] Beck *supra* at 579-583.

[19] In *Orme v Crockford* (1824) 13 Price 389 at 391; 147 Eng Rep 1022 at 1026-1027, Garrow B said: "*It would be a monstrous thing, if we were obliged to give an informer the advantages of ... discovery in aid of an action for ... [treble] penalties, partly for the benefit of himself and partly to be given to the parish...*". See also Alexander CB at 147 Eng Rep 1022 at 1026; *Martin v Treacher* (1886) 16 QBD 507 per Lord Esher MR; at 511-512. *Earl of Mexborough v Whitwood Urban District Counsel* [1897] 2 QB 111 per Lord Esher MR at 115-116.

[20] As originally enacted, the *Customs Act 1901* (Cth) included Part XIV relating to "*Customs Prosecutions*": see *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [108]-[109] per Hayne J. Materially identical provisions to s 247 of the *Customs Act* have appeared in subsequent federal revenue legislation: *Excise Act 1901* s 136; *Income Tax Assessment Act 1922* s 77; *Sales Tax Assessment Act (No 1) 1930* s 57; *Income Tax Assessment Act 1936* s 237; *Pay-roll Tax Assessment Act 1941* s 53; *Wool (Contributory Charge) Assessment 1945* s 57; *Stevedoring Industry Charge Assessment Act 1947* s 46; *Wool Tax (Administration) Act 1964* (Cth) s 75; *States Receipts Duties (Administration) Act 1970* s 72; and *Pay-roll Tax (Territories) Assessment Act 1971* s 53. With the exception of s 136 of the *Excise Act*, each of these provisions has been repealed.

[21] Cited in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 per Mason ACJ, Wilson and Dawson JJ at 335-336; *Rich* per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at [39].

and Arbitration Act 1904,[22] the *Australian Industries Preservation Act 1906*,[23] and Part IV of the *Trade Practices Act 1974*.

44. In 1993, with the introduction of the civil penalty regime currently found in Part 9.4B of the *Corporations Act,* reforms were made to the regime of sanctions concerning enforcement of the statutory duties of corporate officers.[24] Prior to the introduction of the civil penalty regime, the directors' duties provisions were enforceable only by the criminal law.[25] Following the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs, civil penalties were developed as part of a regulatory model of graduated sanctions, aimed at securing compliance under strategic regulation theory and pyramidal enforcement, where no criminality is involved.[26]

45. The civil penalties in Part 9.4B of the *Corporations Act* are thus the product of regulatory legislation the focus of which is upon encouraging compliance. Some commentators have suggested that this is achieved not by turning persons who contravene into criminals, nor rendering them merely liable to pay compensation, but by employing "*the convenient 'half-way house of civil penalties*".[27] Gillooly and Wallace Bruce, for example, conclude that the civil penalty regime strikes an appropriate balance between the interests of the community, and those the subject of such remedies Parliament is able to promote compliance with its legislation "*without the need to criminalise the conduct*". The individual is not subject to "*imprisonment or the stigma of criminal conviction and the civil rules of procedure and standard of proof are*

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[22] Section 119 of the *Conciliation and Arbitration Act 1904* imposed a maximum penalty for breach of an award or order, and was held by the Full Court of the Federal Court in *Gapes v Commercial Bank of Australia Limited* (1979) 27 ALR 87 to create a civil rather than criminal penalty. The legislative history is traced by Sweeney J in *Gapes* at 97-99.

[23] Section 11(1) of the *Australian Industries Preservation Act* 1906 (Cth) was considered by Dixon CJ (McTiernan and Kitto JJ agreeing) with reference to United States analogues in *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194 at 209; see also *Truth About Motorways v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 per Gummow J at [79].

[24] The civil penalty regime in Pt 9.4B of the *Corporations Act* was introduced by *Corporate Law Reform Act 1992* s 17, and commenced on 1 February 1993 (Commonwealth, *Gazette: Special*, No S 25, 27 January 1993). See generally Knackstredt J, "The Evolution in Civil Penalty Proceedings" (2006) 24 *Company and Securities Law Journal* 56.

[25] The criminal sanctions which could be imposed were a fine, imprisonment for up to five years or both under *Corporations Law* s 1311, sch 3 ("Subsection 1317FA(1)"), formerly *Companies (NSW) Code* s 570. See generally Comino V, "Effective Regulation by the Australian Securities and Investments Commission: the Civil Penalty Problem" (2009) 33(3) *Melbourne University Law Review* 802.

[26] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) 190-1 (*Cooney Committee Report*), esp recommendations 7, 22 and 23. See generally Comino V, "Civil or Criminal Penalties for Corporate Misconduct" (2006) 34 *Australian Business Law Review* 428; Comino V, "The challenge of corporate law enforcement in Australia" (2009) 23 *Australian Journal of Corporate Law* 233; Andrews N, "If the Dog Catches the Mice: The Civil Settlement of Criminal Conduct under the *Corporations Act* and the *Australian Securities and Investments Act*" (2003) 15 *Australian Journal of Corporate Law* 137.

[27] Gillooly M & Wallace-Bruce NL, (1994) 13(2) "Civil Penalties in Australian legislation", *University of Tasmania Law Review* 269 at 288. See also the Second Reading Speech of Attorney General Michael Duffy in Parliamentary Debates - House of Representatives, Weekly Hansard, No 15, 3 November 1992 at 2400 and paragraph 114 of the Explanatory Memorandum for the Corporate Law Reform Bill 1992 which effectively mirror recommendations 7, 22, and 23 of the Cooney Committee Report (at pages xi to xv).

sufficiently flexible to ensure that innocent persons are not caught in the civil penalties net".[28]

46. Other commentators have observed that civil penalties "*fit uneasily within the civil-criminal procedural divide*",[29] and that punitive civil sanctions occupy "*the middleground*" between criminal and civil law.[30] The latter description was picked up by the Court of Appeal at CA[694] (ABWhi/128.47) and at CA[705] (ABWhi/130.48). However, nothing in the "*middle ground*" literature suggests an obligation of fairness on a regulator in civil penalty proceedings, let alone an obligation of fairness which requires the calling of particular witnesses absent which the cogency of the regulator's case suffers.

47. Nor is there anything in the rationale which informed the development of the penalty privilege which suggests any such obligation or consequence. Rather, the common law and equitable principles reflected in the penalty privilege are understood as an inhibition on a plaintiff requiring a defendant to assist it to prove its case. It follows that the penalty privilege has no necessary or logical relationship with any supposed obligation of fairness on a regulator in civil penalty proceedings to call witnesses.

48. Following the Court's decision in *Rich*, s 1349 of the *Corporations Act* was enacted,[31] and subsequently amended,[32] to remove penalty privilege in relation to, inter alia, proceedings for disqualification under Part 2D.6. Sub-section 1349(5) provides that ss 1349(1) and (3) have effect despite anything in s 1317L. The 2007 Explanatory Memorandum provides that the removal of penalty privilege "*has effect despite the Court being required to apply the rules of evidence and procedure for civil proceedings.*"[33] By enacting s 1349 Parliament evinced an intention to reduce the availability of penalty privilege in civil penalty proceedings, and at the same time to confirm the applicability of civil rules of procedure and evidence.

49. A consideration of the history of civil penalty proceedings generally, and under the *Corporations Act* in particular, provides no support for any reasoning that involves a modification of the adversarial process.

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[28] Id at 293. Likewise the Australian Law Reform Commission in its 2002 Discussion Paper (No 65) *Securing Compliance: Civil and Administrative Penalties in Federal Jurisdiction*, at [17.1] recognised that a trade-off is involved: "*17.1 ... The trade-off for the lesser protections for the defendant and enhanced capacity to prove a contravention by the regulator in civil procedure is the lack of the 'criminal' label where the contravention is proved.*"

[29] Spender P, "Negotiating the Third Way: Developing Effective Process in Civil Penalty Litigation" (2008) 26 *Company and Securities Law Journal* 249 at 250, also at 258, also Middleton T, "The difficulties of applying civil evidence and procedure rules in ASIC's civil penalty proceedings under the Corporations Act", (2003) 8 *Company and Securities Law Journal* 507-529 at 516.

[30] Mann K., "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law" (1991-1992) 101 *Yale Law Journal* 1795-1874 at 1797.

[31] *Corporations Amendment (Insolvency) Act* (No 132 of 2007).

[32] *Trade Practices Amendment (Australian Consumer Law) Act (No 2)* 2010 (No 103 of 2010).

[33] House of Representatives, *Corporations Amendment (Insolvency) Bill 2007*, Explanatory Memorandum, circulated by the Hon Chris Pearce MP, at page 83, para 5.47.

(c) Model litigant standard

50. The cases and considerations to which the Court of Appeal referred, by way of *"shorthand"* (CA[706] ABWhi/131.06), as imposing upon ASIC the duties of a model litigant do not support the imposition of an obligation of fairness of the kind and with the consequences articulated by the Court of Appeal.

51. Whilst ASIC did not and does not dispute that it has an obligation to conduct proceedings fairly and, in particular, as a model litigant,[34] that obligation does not bear upon the calling of witnesses or matters of proof in civil proceedings.

52. The history and rationale of the model litigant standard are well known: see esp *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 per Griffith CJ at 342 referring to a "*traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects*". The model litigant standard reflects the policies of protecting the reasonable expectations of those dealing with public bodies, ensuring that powers possessed by a public body are exercised for the public good or, in other words, recognising that the body has no legitimate private interest in the performance of its functions, and requiring such bodies to act as "*moral exemplars*" or to lead by example.[35] The obligation to act as moral exemplars also arises because government litigants, by virtue of their size and resources, are often unfairly advantaged over individual litigants.[36]

53. The Legal Services Directions were first issued under s 55ZF of the *Judiciary Act* in 1999, and replaced in 2005. The model litigant obligation is in paragraph 4.2: "*4.2 Claims are to be handled and litigation is to be conducted by the agency in accordance with the Directions on The Commonwealth's Obligation to Act as a Model Litigant, at Appendix B.*" Note 4 was added to Appendix B in 2005 to "*clarify and include information about the Commonwealth's obligations and discretions in relation to cases of public interest.*"[37] The Attorney-General has the sole power to take enforcement action under s 55ZG of the *Judiciary Act* for breaches of the directions. Section

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[34] In the Court of Appeal ASIC accepted that "*ASIC ....as a regulator, stands as a party which is obliged to act fairly, like any other litigant*", but that could not be "*characterise*[d] ..... *as* [having] *some higher degree of fairness, which has some legal consequence in the proceedings*": Court of Appeal transcript day 6 at T447/18-27.

[35] *Hughes Aircraft Systems International v Airservices Australia (No 3)* (1997) 76 FCR 151 per Finn J at 196-197; also *Scott v Handley* (1999) 58 ALD 373 per Spender, Finn and Weinberg JJ at [43]-[45]; further *P & C Cantarella v Egg Marketing Board* [1973] 2 NSWLR 366 per Mahoney JA at 383-384. Also Cameron C & Taylor-Sands M, "'Playing fair': governments as litigants", (2007) 26 *Civil Justice Quarterly* 497-523 at 503 (citing Finn J in *Hughes Aircraft* at 196-197).

[36] Cameron & Sands, *id*, at 503; also *Kenny v State of South Australia* (1987) 46 SASR 268 per King CJ at 273; generally The Hon Justice Jeffrey Spender, "Acting for Government in Criminal and Civil Jurisdictions: Expectations and Ethical Obligations", paper delivered at Bar Association of Queensland conference, 15-17 February 2008.

[37] Explanatory Statement, *Judiciary Act 1903 Legal Services Directions*, issued by authority of the Attorney-General. Dal Pont, writing in relation to government lawyers, adds that "[i]*n conducting litigation government lawyers should act in an exemplary fashion and in a manner indicative of standards that lawyers representing private litigants should seek to emulate*": Dal Pont GE, *Lawyers' Professional Responsibility*, 4th ed., 2010, Law Book Company at 303.

55ZG(3) makes clear that non-compliance with the guidelines ought not be raised in any proceeding except by or on behalf of the Commonwealth.[38]

54. Whilst the role of the Commonwealth as a model litigant influences the way in which it conducts litigation, it does not impinge on the Commonwealth's ability to enforce its substantive rights.[39] The Commonwealth has the same rights as any other litigant, notwithstanding it assumes for itself, quite properly, the role of a model litigant.[40] The standard makes no distinction between proceedings brought by or against a Commonwealth agency. Further, the model litigant standard is unrelated to any question of the statutory powers an agency may possess to bring proceedings (cf CA[728] ABWhi/136.17).[41]

55. No Australian cases concerning the model litigant standard or cases from comparable jurisdictions, or the Legal Services Directions 2005, or similar model litigant standards from other jurisdictions have anything to say about matters of proof or the calling of witnesses.[42]

56. In this case, ASIC complied fully with the model litigant obligation. However, the obligation of fairness sought to be imposed by the Court of Appeal, with evidentiary consequences in the event of non-compliance, is qualitatively different from the standards embodied in the model litigant obligation.

(d) Attributes of a fair trial and the position of Mr Robb

57. At CA[714] (ABWhi/132.23), the Court of Appeal observed that it is not possible to attempt to list exhaustively the attributes of a fair trial, and that the issue "*has arisen in an infinite variety of actual situations in the course of determining whether something that was done or said, either before or at the trial, deprived the trial of the requisite quality of fairness*". The article by the Hon JJ Spigelman referred to at CA[707]

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[38] Peadon C, "What cost to the Crown a failure to act as a model litigant" (2010) 33 *Australian Bar Review* 239 at 242, referring to the Explanatory Memorandum to the Bill introducing ss 55ZF and 55ZG.

[39] *Wodrow v Commonwealth of Australia* (2003) 129 FCR 182 per Stone J at [42]-[43], Peadon *ibid* at 241 and 247.

[40] *Brandon v The Commonwealth* [2005] FCA 109 per Whitlam J at [11]; also Peadon, *id.* See further *Judiciary Act*, s 64.

[41] Austin J in *Rich*, "*in the absence of any duty akin to prosecutorial fairness*", did not regard ASIC as under a duty in civil proceedings to call any particular witnesses (at [560]). Nor did asserting a breach of the model litigant policy add anything to the ordinary application of the rules of evidence, including "the principles in *Jones v Dunkel* and *Browne v Dunn*" (at [560]). In the context of discovery, see Heerey J in *ACCC v Visy Industries Pty Ltd (No 2)* (2007) 239 ALR 762 at [105].

[42] The substance of the model litigant standard has been recognised in the United Kingdom, United States, Canada, New Zealand and India: see for example *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409 at 413; *Skogman v The Queen* [1984] 2 SCR 93 citing with approval *City of Toronto v Polai* (1969) 8 DLR (3d) 689 at 697; *Freeport - McMoran Oil & Gas v FERC* 962 F2d 45 (DC Cir 1992); *Solicitor-General v Miss Alice* [2007] 2 NZLR 783; *Minister of Conservation v The Maori Land Court* [2009] 3 NZLR 465; *Petitioner Mundrik Prasad Sinha v Respondent State of Bihar* 1979 AIR 1871, 1980 SCR (1) 759. The NZ Commerce Commission has adopted a Model Litigant Policy (12 February 2009) which applies to all civil actions including those for pecuniary penalties under the *Commerce Act, Credit Contracts and Consumer Finance Act, and Fair Trading Act*. On 23 June 2010, the Government of India launched a National Ligation Policy, effective from 1 July 2010, which contains some of the same obligations as Australia's Legal Services Directions.

(ABWhi/131.15)[43] gives eleven examples of the attributes of a fair trial. None of these concerns the obligation to call a witness in a civil trial. The eighth concerns prosecutorial discretion and the calling of a witness in a criminal trial.

58. ASIC submits that the attributes of a fair trial conducted in accordance with the adversary system are built into the rules of procedure and evidence that s 1317L invokes. In this case, ASIC (a) filed a detailed pleading; (b) provided extensive particulars; (c) served affidavits and witness statements where possible (and lists of topics where not); and (d) provided a lengthy opening. All these steps ensured that each of the respondents had a full opportunity to meet ASIC's case and to marshal the evidence in support of his or her case.

59. Further, each of the respondents invoked the penalty privilege to the fullest extent possible.[44] This diminished disclosure meant that ASIC did not know until after the commencement of the trial all the matters which were truly in issue. In these circumstances, there was no warrant for ASIC to take any further step to ensure a fair trial, unrelated to the penalty privilege, namely requiring ASIC to call a witness in chief.

60. There was nothing in the circumstances surrounding ASIC's decision not to call Mr Robb which occasioned any unfairness to any of the respondents. The Court of Appeal addressed the events leading up to and following the announcement of the decision not to call Mr Robb at CA[648]-[665] (ABWhi/122.26-125.08). ASIC refers in particular to the following:

(a) case management by Young CJ in Equity leading up to trial required ASIC, inter alia, to provide to the respondents transcripts of all examinations pursuant to s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth), all evidence in the Special Commission of Inquiry into the MRCF undertaken by David Jackson QC (**Jackson Inquiry**), and the entirety of ASIC's database in relation to its investigation;

(b) until the eve of the trial, JHINV/JHIL adopted the position that its former advisers/solicitors were not to provide voluntary assistance to ASIC due to an asserted ongoing duty of confidentiality;[45]

(c) the draft of part one of Mr Robb's statement first became available to ASIC on 7 October 2008, well after the commencement of the trial, and was prepared by Mr Robb's own lawyers (cf the other potential Allens witnesses whose statements were prepared by Allens);[46]

(d) the draft was not signed or sworn, and was incomplete;

(e) ASIC waived any privilege over the draft and provided it to the respondents;[47]

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[43] The Hon. J J Spigelman, "The Truth Can Cost Too Much: The Principle of a Fair Trial" (2004) 78 ALJ 29.
[44] *Macdonald v Australian Securities and Investments Commission* (2007) 73 NSWLR 612.
[45] (DOC.08DEF.001.0102) ABBlu12/5224.
[46] (DOC.08DEF.001.0296) ABBlu12/5308.
[47] Its production was called for by way of notice to produce dated 9 October 2008. On 13 October 2008, the

(f) ASIC had issued a subpoena to Mr Robb and, following the decision not to call him, offered the respondents the opportunity to call Mr Robb in reliance on that subpoena. ASIC made clear that it was "*happy to facilitate* [Mr Robb's] *attendance* [as a witness] *by the subpoena issued at its request*" and that "*if any appellant 'makes a case which requires any of these witnesses to be called in reply, our client will be able to call on the subpoenas*'";[48] and

(g) after ASIC announced its decision not to call Mr Robb, Mr O'Brien requested that Mr Baxter be recalled for further cross-examination which ASIC consented to.[49] No party made a submission that any particular form of unfairness was occasioned to them by the timing of the announcement that Mr Robb would not be called.

61. The Court of Appeal addressed the supposed unfairness occasioned to the respondents from the failure to call Mr Robb at CA[776] (ABWhi/144.15). In doing so, the Court overlooked or gave insufficient weight to the matters noted in [60] above. Mr Robb was equally available to both sides. Both sides had all the s 19 examinations transcripts, Mr Robb's draft statement and the means to secure his attendance. In addition, there is nothing to suggest that the respondents' ability to decide whether to call Mr Robb was hampered by the timing of the notification of ASIC's decision not to call him. Not one of the respondents made any submission to the trial judge or the Court of Appeal to that effect. The reasons of the Court of Appeal in relation to the *"obligation of fairness"* and the acceptance by the Court that Mr Robb had *"his own interests to protect"* (that is, interests that differed from those of ASIC and the respondents) had the result that ASIC was obliged to call Mr Robb to confer on the respondents the forensic advantage of cross-examining him, while ASIC only had a limited possibility of being able to test Mr Robb's evidence in the same way.[50] It is submitted that neither the requirements of a fair trial nor the need to ensure that a regulator's case represents the *"truth"* (cf CA[717] ABWhi/132.46) should have that result.

(e) Prosecutorial duty

62. Although the Court of Appeal stated it was not *"reasoning by analogy"* with criminal procedure (CA[699] ABWhi/129.49), its discussion of the *"obligation of fairness"* and the requirement to call a particular witness appears to have been partly informed by cases concerning the duty of a prosecutor in a criminal trial to call material witnesses and the rationale for the existence of that duty (CA[705] ABWhi/130.48), CA[707] ABWhi/131.15, CA[717] ABWhi/132.46). However, taking the prosecutorial duty as the relevant test, a criminal appeal court will only set aside a verdict arising out of a decision not to call a witness when a miscarriage of justice has been occasioned: *R v Apostilides* (1984) 154 CLR 563 (***Apostilides***); *Whitehorn v The Queen* (1983) 152 CLR 657 (***Whitehorn***).[51]

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notice to produce was called on. ASIC produced part 1 of Mr Robb's draft statement and claimed privilege over it. An affidavit was sworn in support of that claim and filed and served. On 21 October 2008, senior counsel for ASIC informed the Court that ASIC waived privilege over Mr Robb's draft statement.

[48] CA[661] ABWhi/220.12.

[49] T1151/12-1152/6.

[50] By making an application under s 38 of the *Evidence Act*.

[51] In *Hakim v Waterways Authority of New South Wales* (2006) 149 LGERA 415, Spigelman CJ (at [59]) (Grove

63. In applying *Apostilides* and *Whitehorn*, intermediate courts of appeal have referred to the loss to the defence of the opportunity to cross-examine, together with the forensic disadvantage to the defence of having to call a witness, as matters relevant to whether there was a miscarriage of justice.[52] It is submitted that even were ASIC subject to the duty of a prosecutor, no miscarriage of justice can have occurred in circumstances in which Mr Robb was made available by ASIC to be called by the respondents, and at least some respondents having like interests to the respondent calling him would have been able to cross-examine him.[53] Likewise, it would have been available to a respondent calling Mr Robb to make an application under s 38 of the *Evidence Act*.[54]

64. The Court of Appeal simply concluded that if ASIC was under a prosecutorial duty, "*the draft statement of Mr Robb was such that it should have called him.*" (CA[678] ABWhi/126.20). There was no analysis by the Court of, inter alia, the availability of Mr Robb to be called by one of and cross-examined by others of the respondents or the mechanism in s 38 of the *Evidence Act*. The potential unfairness to plaintiffs in civil penalty proceedings from the approach of the Court of Appeal is exposed by the Court's concern that the respondents could not take the risk of calling Mr Robb blind (CA[776] ABWhi/144.15). The comment that ASIC had an obligation to ensure that the proceedings were determined on "*true facts*" (CA[776] ABWhi/144.15) overlooks the difficulty that ASIC itself had only a limited capacity to test the evidence of Mr Robb: see [61] above.

65. Given that the Court of Appeal expressed the obligation of fairness in apparently unqualified terms, the duties imposed on ASIC in civil penalty proceedings appear now to be more onerous than those imposed on prosecutors. In particular, while the Court held that ASIC is not under a prosecutorial duty (at [678] ABWhi/126.21), and that the obligation of fairness "*cannot rise higher than that imposed on prosecutors with respect to their duty to call material witnesses*" (at CA[715] ABWhi/132.32), it did not acknowledge that the prosecutorial duty to call material witnesses (at CA[679] ABWhi/126.27) is not without qualification.[55] Likewise, there is no equivalent in the

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and Bell JJ concurring) said: "*A decision of the prosecutor not to call a particular witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.*" The UK and New Zealand courts take a similar approach to that enunciated in *Apostilides*: *R v Russell-Jones* [1995] 1 Cr App Rep 538; *R v Wilson* [1997] 2 NZLR 500. By contrast, the approach in Canada and the United States to the prosecutorial discretion is less prescriptive: *R v Cook* (1997) 114 CCC (3d) 481 at [23]-[32]; *Commonwealth of Pennsylvania v Horn* 150 A 2d 872 (1959) at 2-3; Notes, "Duty of the Prosecutor To call Witness Whose Testimony Will Help the Accused Establish His Innocence" (1966) *Washington University Law Quarterly*, at 68. In the United States, provided the defence is informed about exculpatory evidence and witnesses, there does not appear to be any additional obligation on the prosecutor to call a particular witness. Further, in the United Kingdom, Canada and the United States, the trial judge can call a witness not called by either party (although the discretion is rarely exercised in the United Kingdom): *R v Dora Harris* [1927] 2 KB 587; *Johnson v United States* (1947) 333 US 46. In New Zealand, in limited circumstances the prosecution can be compelled to call a witness: s 368 (2) *Crimes Act 1961*(NZ); *R v Wilson* [1997] 2 NZLR 500. See discussion in *Apostilides* at 570-571.

[52] For example, *R v Shaw* (1991) 57 A Crim R 425 per Young CJ at 429, Nathan J at 450; *R v O'Brien* (1996) 66 SASR 396 per Doyle CJ at 400 and *R v Jensen* [2009] 23 VR 591 per Nettle and Weinberg JJA and Hollingworth AJA at [77]-[78].

[53] See the judgment of Winneke P, Hayne JA and Southwell AJA in *R v Su* [1997] 1 VR 1 (***Su***).

[54] See in *R v Kneebone* (1999) 47 NSWLR 450 (***Kneebone***) per Greg James J (Spigelman CJ agreeing) at [54]-[56].

[55] Rule 66B of the New South Wales' *Barristers' Rules*; Rule 88 of the Australian Bar Association's proposed

civil penalty regime to the pre-trial disclosure requirements in the *Criminal Procedure Act 1986* (NSW), *Crimes (Criminal Trials) Act 1999* (Vic), *Criminal Procedure Act 2004* (Western Australia), and in subdivision C of Division 1A of Part 3 of the *Federal Court of Australia Act* 1976 (Cth).[56]

66. As to ensuring that the case advanced represents the "*truth*" (CA[717] ABWhi/132.49), the observations of Dawson J in *Whitehorn* at 682 (cited with approval in *Apostilides* at 576) are apposite.[57] In the circumstances, there can have been no miscarriage of justice warranting the setting aside of the trial judge's approval finding.

(f) Cogency of proof and *Briginshaw*

10 67. At CA[753]-[755] (ABWhi/140.29-141.12), the Court of Appeal addressed the consequences of a breach of the obligation of fairness that it found was imposed, namely that the case of the party in default *"suffers in its cogency"* and "*the more so if the Briginshaw principles involving the gravity of the consequences apply*" (CA[753] ABWhi/140.36). The Court contended that this approach was not "*a novel stance*" (CA[754] ABWhi/140.41), citing the decisions of Hodgson JA in *Ho v Powell* (2001) 51 NSWLR 572 and Campbell J in *Shalhoub v Buchanan* [2004] NSWSC 99 (at [754] ABWhi/140.48).

68. ASIC submits that there is considerable novelty in this approach. This was not a case such as *Ho* at [14] where there was *"limited material* [as] *an appropriate basis on which*
20 *to reach a reasonable decision",* or *Shalhoub* at [71] where the evidence *"as has been called does not itself clearly discharge the onus."* Even on the Court of Appeal's approach, the minutes of the meeting, as reviewed and billed for by Mr Robb and approved by the respondents (see [80] to [91]), provided more than a sufficient basis to prove ASIC's case. In the terms used in *Whitlam,* the minutes were exact proof, and did not leave the Court to *"rely on uncertain inferences"* (at [119]). This was not a case where an indefinite proof was found to be insufficient in the absence of a particular witness, but apparently a case where an exact proof was found to have suffered in its cogency. It is submitted that that approach is novel and finds no support in s 140 of the *Evidence Act* or elsewhere. It is illogical to conclude that the evidence presented by
30 ASIC did not establish its case because missing information of an unknown quality and persuasiveness was not before the trial judge.

69. ASIC submits that the civil standard of proof is sufficiently flexible to accommodate the penal nature of civil penalty proceedings, and in particular the gravity of the consequences of an adverse finding.[58] Where a particular witness is not called in civil penalty proceedings, a *Jones v Dunkel* inference may be drawn.[59] However, there is no,

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Barrister's Conduct Rules, dated 1 February 2010.

[56] These provisions were enacted in New South Wales in 2001, Victoria in 1999, Western Australia in 2004, and federally in 2009.

[57] *"A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations."*

[58] Gillooly and Wallace Bruce *op cit* at 291.

[59] For example *Adler* at [644]. However, the unexplained failure of a party to give evidence, call witnesses or tender material is not treated as evidence of fear that it would expose an unfavourable fact, nor as an assertion of

nor has the Court of Appeal provided any, principled basis for importing the notion of an obligation of fairness as part of any type of the *Briginshaw* analysis so as to convert an exact proof into an inexact one.

(g) Uncertain scope

70. The lack of clarity provided by the Court of Appeal in relation to the "*middle ground*" (CA[705] ABWhi/130.48) said to be occupied by regulators is illustrated by the Court's failure to articulate a single test in relation to the kind of witness which ASIC is obliged to call. Mr Robb is variously described in the judgment as "*an important material witness*" (CA[673] ABWhi/126.01), someone who "*would probably have knowledge on the issues*" (CA[766] ABWhi/142.43; [774] ABWhi/143.49), a witness of "*such central significance to critical issues that had arisen in the proceedings*", and "*a witness of such potential importance*" (CA[775] ABWhi/144.05). The lack of clarity is further illustrated by the divergence within the Court as to whether the obligation of fairness was triggered only in the case of Mr Robb (Spigelman CJ and Beazley JA at CA[770] ABWhi/143.18), or also in the case of one or both of the UBS bankers Messrs Wilson and Sweetman (CA[771]-[774] ABWhi/143.25-144.02).

71. A further difficulty with the Court of Appeal's formulation of the obligation of fairness and its underlying rationale is that it does not address the diversity of the Commonwealth agencies which can bring civil penalty proceedings or the diversity of enforcement powers available to them. Nor does the formulation address whether, and if so how, a regulator can persuade a Court that it has acted consistently with the duty by not calling a particular witness.

72. This latter difficulty is highlighted by considering how the obligation of fairness and its rationale emerged in the appeal. In finding that ASIC was subject to an obligation of fairness and that the underlying rationale for the obligation was to ensure that its case "*represent[ed] the truth*", the Court of Appeal changed the framework under which ASIC had previously assessed whether it was required to call a witness. Prior to the Court of Appeal's decision, that assessment fell to be determined according to what camp the witness was in (that is, *Jones v Dunkel*), and the sufficiency or exactness of the proof it put forward (that is, *Whitlam*). An assessment of the reliability of the evidence of the witness was not relevant to an analysis undertaken by reference to *Jones v Dunkel* or *Whitlam*.

73. However, it may be implicit in the Court of Appeal's reasoning that whether or not ASIC is obliged to call a witness can turn on the reliability of the evidence of the witness. Presumably, the obligation of fairness articulated by the Court cannot require

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the non-existence of the fact not proved: the only consequence is that the failure can cause an inference arising from the evidence of the opposing party to be more confidently drawn *HML v R* (2008) 235 CLR 334 at [302]-[303] per Heydon J distinguishing the position in the United States stated by *Wigmore*. In the United States the principle - which derives from *Graves Case* 150 US 118 (1893) and also appears to stem from *Blatch v Archer* (1774) 1 Cowp 63 - is sometimes referred to as the "*missing person*" or "*empty chair*" doctrine, and permits the drawing of an inference that the missing testimony if produced would be unfavourable: Webster, King and Kassin, "Voices from an Empty Chair" (1991) 15 *Law and Human Behaviour*' Stier, "Revisiting the Missing Witness Inference" (1985) *Maryland Law Review* 137.

ASIC to call a witness if there are reasonable grounds for believing that their evidence is unreliable.

74. Neither Mr Terry nor the Court of Appeal in oral argument suggested that the rationale for an obligation of fairness might be to ensure that the case presented does *"in fact represent the truth"*. The first occasion any such rationale was suggested was in the Court of Appeal's published reasons. If the obligation of fairness and its rationale, in the form enunciated by the Court of Appeal, had been known to exist at the time of the trial, then presumably it would have been open to ASIC to address why, consistent with the need for its case to *"represent*[s] *the truth"*, it did not call Mr Robb. In the result, ASIC had no opportunity to address why the decision not to call Mr Robb was consistent with the obligation of fairness enunciated by the Court of Appeal and its identified rationale.

75. If the formulation of the obligation and its underlying rationale are accepted, and if it also accepted that a regulator can discharge that obligation by demonstrating that there are reasonable grounds for believing that the evidence of the missing witness is unreliable, then a further question arises as to how that can be demonstrated. *Apostilides* at 575 contemplates that a Crown Prosecutor can be questioned by the trial judge as to the reasons for the decision not to call a witness, or may chose to state the reasons, and that this occurs from the bar table.[60] However, this occurs in the context of whether the trial judge may or may not give a direction to the jury. On appeal, the reasons may be apparent from the trial transcript or are in some cases set out in an affidavit from the Crown Prosecutor[61] or other witnesses.[62] In this case, the Court of Appeal did not state whether or not a trial judge could hear and then determine a contention that the regulator breached the "*obligation of fairness*" by its decision not to call a witness and, if so, by what procedure that contention would be determined.

76. None of these questions was addressed by the Court of Appeal yet, assuming the approach to be correct, each is raised and unresolved.

COURT OF APPEAL ERRED IN ITS APPROACH TO THE EVIDENCE CONCERNING THE APPROVAL OF THE DRAFT ASX ANNOUNCEMENT (GROUNDS 6, 7, 10 AND 11)

77. It is apparent from the Court of Appeal's summary of reasons at CA[789]-[796] (ABWhi/146.26-147.46) that the finding that ASIC breached its *"obligation of fairness"* in failing to call Mr Robb was critical to the ultimate finding (CA[796] ABWhi/147.42) that it was not satisfied that the non-executive directors voted in favour of the Draft ASX Announcement. If that aspect of the Court's reasoning is removed, then the question arises as to whether the trial judge's approval finding should be overturned or upheld. (If not, then the balance of these grounds of appeal still arise).

78. In Part 4 of its judgment, the Court of Appeal addresses aspects of the evidence relevant to the approval and tabled findings. Section 4.5.6 concerns the tabling of the Draft ASX Announcement (the relevant findings have been noted above at [11(a), (b) and (c)]). The

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[60] See for example, the statement of the Crown Prosecutor extracted in *Su* at 33.
[61] See for example, *Santo v R* [2009] NSWCCA 269 at [20].
[62] As, for example, in *Kneebone* at [33] (solicitor's affidavit recounting discussion with Crown Prosecutor).

findings of the trial judge and the Court of Appeal on this issue are challenged by way of notices of contention, and ASIC has two *"defensive"* grounds of appeal which are addressed below at [127] to [136].) The balance of Part 4 addresses matters relevant to the approval finding, namely whether approval of the Draft ASX Announcement was a necessary aspect of establishing the MRCF (4.5.3), JHIL practice in relation to ASX announcements (4.5.4), the correlation evidence (4.5.7), the absence of protest from the non-executive directors concerning various documents sent to them after the meeting (4.5.8), the minutes of the meeting (4.5.9), and various documents and evidence contended by ASIC as constituting a later acceptance by some or all of the non-executive directors that there had been a tabling and approval of the Draft ASX Announcement (4.5.10).

79. As to item 4.5.3, the Court rejected ASIC's contention that an *"announcement of full funding"* was a necessary element for approval of the separation proposal (CA[300] ABWhi/65.15), but later accepted that *"that there is some basis in the communication of full funding in order to quell stakeholder opposition"* (CA[792] ABWhi/147.02) and made the other finding noted in [13] above. As to items 4.5.8 and 4.5.10, the Court's findings neither tend to support nor negate approval having been given by the board, except for one matter, and the evidentiary significance of such of these matters as are relevant to ASIC's case on appeal is addressed below. The one matter of exception concerns three declarations that were given by each of Mr Brown, Ms Hellicar and Mr Gillfillan to JHINV in September 2004, which were admitted against them alone, and which stated, inter alia: "*I participated in the deliberation leading to the decision taken by the Board .. and in the decision itself to approve the terms of the press release*" made to the ASX (CA[549] ABWhi/106.01). In light of certain findings of the trial judge, the Court of Appeal concluded that the weight of these declarations as admissions was "*severely compromised*" (CA[617] ABWhi/116.34). However, ASIC submits that they nonetheless provide significant support for its case.

The minutes (Ground 10)

80. A copy of the signed minutes is at ABBlu5/2118-2125. Attached to these submissions is a copy of the minutes annotated with the *"errors"* identified by the trial judge (at LJ[1207]-[1220] ABRed2/723H-725X) and referred to by the Court of Appeal (at CA[489]-[496] ABWhi/97.10-98.37]). The Draft ASX Announcement Resolution is at page 7 of the minutes (ABBlu5/2124P). Its terms are reflected in ASIC's pleaded case. The resolution has a bold heading. As noted by the Court of Appeal, its presence *"was fairly prominent, even on a scan of the minutes"* (CA[496] ABWhi/98.27).

81. The chronology concerning the preparation and approval of the minutes is set out at CA[472]-[483] (ABWhi/94.06-95.17). The following should be noted about that chronology:

    (a) drafts of the minutes were prepared in advance of the 15 February 2001 board meeting which contained a draft of a resolution approving an ASX announcement (CA[472]-[477] ABWhi/94.06-94.39). These included a draft sent by Mr Robb at 8.05am on the morning of 15 February 2001 (CA[477] ABWhi/94.35; ABBlu5/2102-2111). The trial judge found: *"[i]n the expectation that it would be, the draft minutes contained the resolution that the Draft ASX Announcement was approved"* (LJ[1192] ABRed2/720Q);

(b) the next version of the minutes was attached to an email sent by Mr Shafron to Mr Macdonald and Mr Morley on 21 March 2001 (CA[479] ABWhi/94.45; ABBlu6/2671-2679). This version retained a resolution approving an ASX Announcement and, as noted by the Court of Appeal, "*included the matters other than the establishment of the Foundation*" (CA[479] ABWhi/94.48). The "*matters*" which were included were matters that had occurred at the meeting on 15 February 2001. These included the introductory parts of the minutes, including the correct time and attendees (page 1; ABBlu6/2672; cf ABBlu5/2103); the matters at the end of the meeting, including the closure time and the appointed time for the next meeting (page 8; ABBlu6/2679S-U; cf ABBlu5/2111C-E); and critically the fact of the tabling of the *"cashflow model"* (page 3; ABBlu6/2674N-P; cf ABBlu5/2105). Copies of the *"cashflow model"* were distributed to the board on 15 February 2001, and Mr Morley addressed its contents (LJ[9] ABRed2/396Q; LJ[287]-[301] ABRed2/484U). Further, two resolutions proposed in the 15 February draft were not included in the amended version prepared on 21 March 2001 (consolidation of shares in Jsekarb: ABBlu5/2105N-S; cf ABBlu6/2674 and litigation management contract: ABBlu5/2109F-K; cf ABBlu6/2678). The order of the remaining resolutions suggested in the 15 February 2001 draft[63] was altered in the version prepared on 21 March 2001;[64]

(c) Mr Robb sent an account under cover of a letter dated 29 March 2001. It stated it was, inter alia, for work done in "*settling various completion documents and board minutes as required by Alan Kneeshaw for JHIL ....*" (CA[481] ABWhi/95.08; ABBlu7/2826-2829);

(d) the draft minutes were sent to each of the non-executive directors with their board packs prior to the April meeting (LJ[1193] ABRed2/720T; CA[482] ABWhi/95.12; ABBlu6/2580-2587). Between the meeting on 15 February 2001 and this time, each of the non-executive directors had been sent the Final ASX Announcement (LJ[1165] ABRed2/715Q; CA[437] ABWhi/88.41); and

(e) on 3-4 April, at a board meeting attended by all of the non-executive directors (other than Mr Willcox), as well as the Chairman, Mr Macdonald, Mr Shafron and Mr Morley, the minutes were approved (LJ[1193] ABRed2/720T; LJ[53] ABRed2/412J; CA[483] ABWhi/95.16; ABBlu7/2839-2841).

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[63] In the 15 February 2001 draft, the order of proposed resolutions was (ABBlu5/2105 to 2110): (i) consolidation of shares in Coy; (ii) consolidation of shares in Jsekarb; (iii) establishment of the MRCF and Coy and Jsekarb separation; (iv) amendments to the constitution of Coy and Jsekarb; (v) Coy and Jsekarb change of names; (vi) appointment of directors for Coy and Jsekarb; (vii) constitute the MRCF; (viii) indemnity; (ix) intercompany loans; (x) shareholding in Jsekarb; (xi) shareholding in Coy; (xii) gift of AU$3 million to MRCF; (xiii) establishment letter; (xiv) litigation management contract; (xv) further actions; (xvi) power of attorney; (xvii) ratification of actions of Coy directors; (xviii) ratification of Jsekarb directors; and (xix) ASX announcement.

[64] In the 21 March 2001 draft, the order of the resolutions was (ABBlu6/2674 to 2679): (i) consolidation of shares in Coy; (ii) establishment of the MRCF and Coy and Jsekarb separation; (iii) amendments to the constitution of Coy and Jsekarb;(iv) Coy and Jsekarb change of names; (v) appointment of directors for Coy and Jsekarb; (vi) constitute the MRCF; (vii) indemnity; (viii) intercompany loans; (x) shareholding in Coy; (xi) shareholding in Jsekarb; (xii) gift of AU $3 million to MRCF; (xiii) establishment letter; (xiv) further actions; (xv) ratification of actions of Coy directors; (xvi) ratification of Jsekarb directors; (xvii) power of attorney; and (xviii) ASX announcement.

82. At trial, ASIC relied on the statutory presumption of accuracy afforded to the minutes by s 251A(6) of the *Corporations Act*. ASIC also contended that the minutes were a business record, and powerful admissions by each of the relevant defendants. The trial judge found that ASIC could not rely on the statutory presumption in s 251A(6) because the minutes were not recorded in the company minute book within one month, as required by s 251A(1) (LJ[72] ABRed2/418L). The trial judge otherwise addressed the minutes at LJ[1192]-[1220] (ABRed2/720P-725X). In the Court of Appeal, there was a dispute as to the effect of the findings in this part of the liability judgment. ASIC contends that the trial judge relied on the minutes as confirmation of the tabled and approval findings (see, for example, LJ[1203] ABRed2/723B referred to below), as well as a matter undermining the credibility of those respondents who gave evidence.

83. The Court of Appeal addressed the minutes at CA[463]-[497] (ABWhi/93.10-98.42). It concluded that they were a *"significant matter in ASIC's case"* but "*their reliability and thus their weight in that case is very much open to question*" (CA[497] ABWhi/98.40). ASIC makes the following submissions in relation to the approach of the Court of Appeal.

84. First, the approach fails to appreciate the significance of the minutes in their statutory context. Part 2G.3 of the *Corporation Act* provides a scheme for the creation and maintenance of minutes, including the *"proceedings and resolutions of directors' meetings"* (s 251A(1)(b)), and for access by members to the minutes (s 251B). This ensures that the decisions of boards are properly documented, and that members and outsiders to the company are able to ascertain what they were. Section 251A prescribes various steps that the company must take with the minutes which, if not taken, constitute an offence (s 251A(5)). These steps include the keeping of minute books which record within 1 month the *"proceedings"* (s 251A(1)), and the minutes being signed within a reasonable time after the meeting (s 251A(2)). Sub-section 251A(6) confers a presumption on the "*proceedings* [or] *resolution*" to which the minutes relate, provided that the minute is *"so recorded and signed"*. The trial judge's finding that the presumption was not engaged because the minutes were not recorded in a minute book within one month of the proceedings (LJ[72] ABRed2/418M) does not deny the minutes their evidentiary force as a business record and an admission. Moreover, in terms of the weight to be afforded to them as an accurate record, the significance of company minutes to members and outsiders such as ASIC, and the responsibilities of the respondents (and Mr Robb) concerning their proper preparation needs to be borne in mind. The respondents have in effect sought to rely on their own apparent dereliction in the adoption and recording of the minutes to deny them weight.

85. In this regard, the Court of Appeal's approach fails to give sufficient weight to the involvement of relevant individuals in the preparation and approval of the minutes:

    (a) the minutes were drafted under the supervision of Mr Robb prior to the meeting, and were sent to him after the meeting. He and his firm charged for *"settling"* the minutes. As a legal practitioner and partner of a major legal firm, Mr Robb could be expected to appreciate the importance of accuracy in the minutes of a major public company. This is more so in circumstances in which the minutes were recording a meeting at which one of, if not the, most important decision in the history of the company was being made. The respondents' case and the Court of Appeal's findings suggest that Mr Robb either knowingly or negligently allowed

false minutes to be circulated to the board of JHIL. Why that would have occurred was not addressed by any respondent or the Court of Appeal;

(b) similar considerations apply in the case of Mr Shafron. Mr Shafron amended drafts of the minutes prior to the meeting on 15 February 2001, and on 21 March 2001 circulated a revised draft which took into account events that had occurred at the 15 February 2001 meeting (see above at [81(b)]). Mr Shafron attended the board meeting on 3-4 April 2001 when the minutes were approved. Mr Shafron was not only the company secretary and general counsel for JHIL, but was also an experienced legal practitioner (LJ[378] ABRed2/511T);

(c) the CFO, Mr Morley, was sent a draft of the minutes on 21 March 2001 (LJ[1193] ABRed2/720T; CA[482] ABWhi/95.13; JHAB.112.002.0047; ABBlu6/2580-2587), and attended the board meeting on 3-4 April 2001 when the minutes were approved (LJ[1193] ABRed2/720T; LJ[53] ABRed2/412K; CA[483] ABWhi/95.16);

(d) each of the non-executive directors received a copy of the draft minutes with their board packs. Following the 15 February 2001 meeting, they had received copies of the Final ASX Announcement. Other than Mr Willcox, they all voted to adopt the minutes at the meeting on 3-4 April 2001. In relation to Mr Willcox, at no time did he point out any error in the minutes notwithstanding that "*his normal practice was to read minutes to assure him*[self] *that the essence of major decisions had been recorded.*" (LJ[1198]; ABRed2/722D); and

(e) the minutes were not only approved at the 3-4 April 2001 meeting by the Chairman, Mr McGregor, but they were later signed by him. Mr McGregor had also attended the meeting on 15 February 2001 (LJ[53] ABRed2/412J; LJ[1193] ABRed2/720T; ABBlu5/2118-2125).

86. A consideration of these matters, the nature of the minutes, the importance of the decisions made at the meeting on 15 February 2001, the fact that the Final ASX Announcement had been sent to the directors in the meantime, and the finding that the *"reaction of stakeholders was in the Directors minds"* (CA[99] ABWhi/25.36), makes it overwhelmingly improbable that any, much less all, of these individuals would have missed the inclusion in the minutes of a resolution approving an ASX announcement that did not occur. This was recognised by the trial judge at LJ[1203] (ABRed2/723C). By contrast, nowhere in its judgment does the Court of Appeal attempt to resolve how, consistent with its finding that it was not satisfied that the Draft ASX Announcement Resolution was passed, each or indeed any of these persons could have acted in the way they did in relation to the minutes.

87. Second, a consideration of the chronology of the preparation of the minutes reinforces the overwhelming likelihood that they accurately recorded the passing of a resolution approving the Draft ASX Announcement (see [81] above). The drafts of the minutes prepared in advance anticipated that there would be such a resolution. The first revision after the meeting clearly reflected events that occurred at the meeting such as the tabling of the cash flow model, but there was no alteration to the recording of the resolution concerning the ASX announcement. The drafts of the minutes were received and then approved by the board at a time contemporaneous with the events.

88. Third, contrary to the approach of the Court of Appeal, the *"errors"* that were established in relation to the minutes were trivial, and did not detract from the powerful evidence they constituted in support of ASIC's case. Although the Court of Appeal referred to the *"reliability"* of the minutes being *"open to question"* (CA[497] ABWhi/98.38), and stated that there were *"significant considerations telling against the weight"* to be given to them (CA[791] ABWhi/146.42), the only adverse findings concerning their reliability were the *"errors"* identified and addressed by the trial judge at LJ[1203]-[1220] (ABRed2/723B-725X). Their lack of any real significance can be gauged by considering the annotated minutes accompanying these submissions.

89. The Court of Appeal addressed the errors at CA[492]-[496] (ABWhi/97.33-98.36). The only matters identified by the Court of Appeal as warranting a departure from the trial judge's assessment were some scheduling errors (CA[492] ABWhi/97.33; page 1 of the minutes) and the inclusion of a figure of $72m rather than $65m (CA[492] ABWhi/97.33; pages 3 and 5 of the minutes). These were described as *"significant"*, but they are qualitatively different from the apparent wholesale inclusion of a resolution which is said not to have occurred. The former are the type of error that might not be picked up 5 weeks later unless they were the subject of close scrutiny. The latter would be apparent on the most cursory skim. Why such *"errors"* would suggest that each of the Chairman, Messrs Macdonald, Shafron, Morley, Robb and the entire board would miss an entire resolution that was clearly stated in bold, and was apparent on even a cursory review, was not explained by the Court of Appeal (see CA[496] ABWhi/98.25).

90. Fourth, in a number of places the Court of Appeal makes reference to the evidence of Mr Morley (CA[485] ABWhi/96.20 and CA[495] ABWhi/98.13), Ms Hellicar (CA[495] ABWhi/98.26), Mr Willcox (CA[495] ABWhi/98.16) and Mr Brown (CA[496] ABWhi/98.30) concerning the accuracy of the minutes. However, the Court did not make any findings adverse to the accuracy of the minutes beyond those found by the trial judge based on their evidence. The trial judge rejected their evidence on this topic as *"mistaken"* (LJ[222] ABRed2/467P, LJ[228] ABRed2/469D), and did not make any finding accepting their evidence on any matter concerning approval of the Draft ASX Announcement or the accuracy of the minutes. There was no ground of appeal which sought to establish any error of the kind identified in *Fox v Percy* (2003) 214 CLR 118 on the part of the trial judge in this respect.

91. Fifth, at CA[485] (ABWhi/96.20) the Court found that the trial judge's finding at LJ[1199] (ABRed2/722I) concerning Mr Morley's evidence did not accurately reflect his evidence. The Court then summarised part of Mr Morley's evidence as to whether a *"draft news release"* was tabled or read out. With respect, the error was the Court of Appeal's. At LJ[1199] (ABRed2/722I) the trial judge addressed Mr Morley's evidence concerning the minutes, and found that "*Mr Morley, who attended the 3 April 2001 board meeting said that he always believed that the minutes of the 15 February 2001 Meeting were correct*". This accurately reflected the following question and answer:

> "*Q. Your honest belief has always been that those minutes were accurate and correct; that's right, isn't it? A. Yes*". (T1601/5-7 ABBla2/921D-E).

***"Work in progress"* or *"Approval in principle"* (Ground 7)**

92. At various points in its judgment, the Court of Appeal refers to the possibility that, instead of approving the Draft ASX Announcement, it "*might have been taken to the*

Board [meeting] as a work in progress, or for some kind of approval in principle" with management to finalise and later send to the ASX (CA[790] ABWhi/146.38; see also CA[432] ABWhi/88.01, CA[384] ABWhi/78.29 and CA[316] ABWhi/67.38). The Court made no express finding in this regard, but appears to reason that, because of the consequences for the cogency of ASIC's case arising from the failure to call Mr Robb, ASIC had not excluded to the relevant standard the possibility that this had occurred (CA[790]-[796] ABWhi/146.32-147.46).

93. The genesis of these alternatives is the discussion in Part 4.5.4 of the judgment concerning the usual practice of JHIL in relation to announcements of this character. At CA[302]-[315] (ABWhi/65.35-67.37), the Court considered the competing submissions of the parties in relation to the effect of Mr Baxter's evidence of JHIL's usual practice concerning the approval of important announcements of this kind (extracted at CA[303] ABWhi/65.44; see ABBlu10/4596M-4597I and 4615M-4616Q). The Court concluded that the absence of any pre-meeting vetting of announcements of the kind described by Mr Baxter meant that ASIC could not derive any support from Mr Baxter's evidence that the importance of the announcement meant that the board was required to approve it before it was released (CA[310] ABWhi/66.481). The Court considered that the absence of pre-vetting provided *"some support"* in the opposite direction (CA[311] ABWhi/67.01), but that could not be *"overstated"* (CA[311]-[312]). The Court developed that conclusion, observing that the changes between the Draft ASX Announcement and the Final ASX Announcement suggested *"that whatever occurred* [at the board meeting] *was no more than consideration of a draft news release as a work in progress"* (CA[316] ABWhi/67.42). The reasoning is further developed at CA[317]-[358] (ABWhi/67.46-73.42). ASIC submits as follows in relation to that reasoning.

94. First, the significance of this part of the Court of Appeal's reasoning to its overall lack of satisfaction that ASIC had established this aspect of its case should not be overstated. The Court did not consider that the making of changes to the Draft ASX Announcement subsequent to the meeting was necessarily inconsistent with ASIC's case; only that it *"detracted"* from it (CA[320] ABWhi/68.23). The Court noted the evidence of Mr Baxter that if material changes to an ASX announcement had been made after approval by the board, there was an established procedure by which changes could be settled which involved Mr Baxter advising Mr Macdonald, Mr Macdonald consulting with the Chairman, Mr McGregor, and Mr McGregor then deciding whether to consult the rest of the board (CA[333]-[335] ABWhi/69.25-69.44). An approval of a draft announcement by the board which enabled changes to be made in accordance with this procedure would be consistent with the approval recorded in the minutes and the approval alleged by ASIC.

95. Second, in observing (at CA[311] ABWhi/67.01) that the absence of pre-meeting vetting provided *"some support"* for the suggestion that the Draft ASX Announcement was not approved at the board meeting, the Court of Appeal overlooked the fact that pre-meeting draft minutes, reviewed by Allens and management less than 2 hours before the February meeting, anticipated the board approving an ASX announcement. This was the case notwithstanding that those preparing the minutes, including Mr Robb, had not yet seen the Draft ASX Announcement. Thus, neither management nor Allens anticipated a difficulty with the board approving a draft announcement, although it had not been vetted by Allens. This is not surprising given that it was anticipated by all that there would be an announcement, but that refinement of its terms did not commence

until the evening before the meeting and that the persons expected to undertake the vetting, Allens, would be present during the meeting.

96. Third, it seems that the significance of the Court of Appeal's speculation about these alternatives is that they were matters that could not be excluded, having regard to ASIC's failure to call Mr Robb (CA[790]-[796] ABWhi/146.32-147.44). The findings concerning that have been addressed above.

97. Fourth, although the Court considered that *"there must be [an] assessment of the united force of the evidence"* (CA[793] ABWhi/147.12), there was no attempt by the Court to reconcile the possibility that the Draft ASX Announcement was discussed by the board as a "*work in progress*" or "*approval in principle*", against the minutes. The resolution recorded in the minutes is inconsistent with a discussion by the board of an ASX announcement as a "*work in progress*". If there had been only a discussion of the document as a "*work in progress*", that makes it inherently unlikely that all of the persons who drafted, reviewed, billed for, approved or signed off on the minutes would not correct them so as to ensure they did not record a resolution that was not made. It is a scenario that involves the directors having had their attention specifically drawn to an important announcement they did not approve, and then later being asked to approve a set of minutes which specifically states that they did. Without further elaboration by the Court of Appeal, it does not necessarily follow that an *"approval in principle"* was inconsistent with the resolution recorded in the minutes, especially given the procedure for post-meeting changes noted at CA[333] (ABWhi/69.25). The distinction between the resolution recorded in the minutes and a resolution *"in principle"* that an announcement in the form of the Draft ASX Announcement is, with respect, illusory.

98. This failure to assess the changes against the terms of the minutes is exemplified by the reasoning at CA[337]-[358] (ABWhi/70.01-73.42). After describing the changes between the Draft ASX Announcement and the Final ASX Announcement as *"significant"* (CA[336] ABWhi/69.45), the Court stated "*this suggests that making them was thought to be open despite whatever had occurred at the meeting*". The person(s) who might have *"thought"* this are not identified, but appear to be Mr Harman and Mr Shafron, as they are referred to in CA[337] (ABWhi/70.05). Mr Shafron reviewed drafts of the minutes in advance of the meeting, prepared and circulated a significantly revised draft after the meeting, supervised the sending of the draft to members of the board, and was present when they were approved. ASIC submits that this cannot be reconciled with a belief on the part of Mr Shafron that the board had not approved the Draft ASX Announcement, but rather discussed it as a "*work in progress*".

99. The Court noted Mr Harman's evidence that it was "*not my understanding that the press release was set in stone at the board meeting*" CA[337] (ABWhi/70.07) (ABBla1/92P-Q) However, having regard to Mr Baxter's evidence as to the practice by which post-approval changes could be made (CA[333]-[335] ABWhi/69.25-69.44), Mr Harman's evidence was not inconsistent with the passing of a resolution for the approval of the Draft ASX Announcement.

100. Fifth, speculation by the Court of Appeal that at the 15 February 2001 board meeting there might have been discussion of the Draft ASX Announcement as a "*work in progress*" or "*approval in principle*" was not supported by the evidence of any of the respondents who gave evidence.[65]

101. Sixth, the Court of Appeal's speculation proceeds upon the basis that the changes between the Draft ASX Announcement and the Final ASX Announcement were *"significant"* (CA[336] ABWhi/69.45). It is submitted that this is incorrect. The changes are addressed at CA[322]-[332] (ABWhi/69.29-69.24). CA[323] (ABWhi/68.36) suggests that the change from $284 million to $293 million in the second and eighth paragraphs was *"not a minor matter"*. However, the reason for the change was a change in the discount rate applied to payments under the DOCI (CA[323] ABWhi/68.34). Such a change does not detract from the approval recorded in the minutes. Similarly, the changes at CA[327] (ABWhi/68.50) corrected grammar, the change at CA[328] (ABWhi/69.05) more accurately described the function of Towers Perrin, and the change noted at CA[329] (ABWhi/69.08) made it clear that directors had determined the level of funding required by the MRCF. None of these are of any significance, especially given the evidence of Mr Baxter concerning the procedure for post-meeting changes.

102. The only other changes are discussed at CA[324] (ABWhi/68.37) and CA[331] (ABWhi/69.19). They concern changes to the third and tenth paragraphs of the Draft ASX Announcement which the Court considered reduced the assurance as to sufficiency of funds being proffered. The Court speculated that such changes may have come about because of suggestions from Mr Robb (as to which see below). The emphasis on those two paragraphs overlooks the fact that the message of *"fully funded"*, *"certainty"* and payment of all claims (after which there would be a surplus etc) was made in both the Draft ASX Announcement and the Final ASX Announcement. That is, overall there was no change in the substance of the message (and both were grossly misleading on that account as found at LJ[615]-[620] ABRed2/571B-572N and confirmed at CA[831] ABWhi/157.45).

103. Seventh, at CA[339]-[358] (ABWhi/70.27-73.43) the Court of Appeal speculated about the significance of the annotations to copies of the Draft ASX Announcement that were produced by Allens to ASIC.[66] Both copies contain handwritten annotations to only the third paragraph of the Draft ASX Announcement, and one of them contains an indefinite scribble on the word *"all"* in the tenth paragraph.[67] On neither copy is the phrase *"fully funded"* or *"certainty"* annotated or altered. On neither copy is there any annotation or alteration to the eleventh paragraph which refers to the "*directors of James Hardie [being] satisfied the Foundation will have sufficient funds to meet all future claims"*, or to the thirteenth paragraph which stated that *"When all future claims had been concluded, the Foundation will convert any remaining assets ...*". Nevertheless, on the basis of these annotations and the evidence concerning the

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[65] The phrase "*work in progress*" to describe the announcement was raised in the cross-examination of both Messrs Harman (ABBla1/90V-91K) and Baxter (ABBla1/351P-352M). In neither case was it put to or suggested by them that the Draft ASX Announcement was discussed by the board as a "*work in progress*".
[66] ABBlu5/2185-2188.
[67] ABBlu5/2185T.

telephone conversation that morning between Messrs Macdonald, Shafron, Robb and Peter Cameron (see CA[341] ABWhi/70.41) the Court of Appeal concluded that Mr Robb "*contemplated [a] reduction in the level of assurance of adequate funding by introduction of expectation and* [sic] *an actuarial basis*"(CA[351] ABWhi/72.20) and that "*Allens suggested changes brings considerable pause to a conclusion" that the 7.24am draft news release was approved at the meeting*" (CA[358] ABWhi/73.41).

104. ASIC submits there was no occasion for *"considerable pause"* because of either the conversation on the morning of the board meeting or the annotations on the Allens' copies of the Draft ASX Announcement. The annotations were made by the same Mr Robb who sent a version of the minutes on the morning of the meeting which referred to an ASX announcement resolution, who received drafts of the minutes after the meeting which retained the resolution, and who charged for reviewing the minutes. Moreover both of the Allens' versions of the Draft ASX Announcement, even with their annotations, contained an unequivocal message of full funding and certainty, as did the Final ASX Announcement.

105. The Court of Appeal disagreed with the trial judge's analysis of the telephone conversation in the morning prior to the board meeting (extracted at CA[341]-[342] ABWhi/70.41-71.25). At LJ[327] (ABRed2/497P) the trial judge concluded that neither Mr Cameron nor Mr Robb had reacted to the unequivocal and unqualified statements in the Draft ASX Announcement when they read their copies at the 15 February 2001 board meeting because Mr Cameron "*accepted the term 'fully funded' as appropriate but earlier that morning he and Mr Robb had been advised of a new development that they had not had time to absorb*". The Court of Appeal found that this analysis was *"flawed"* because it started in part with what was in issue, namely that the Draft ASX Announcement was at the board meeting (CA[356] ABWhi/73.25). However, there was no such flaw in the trial judge's reasoning. At LJ[327] (ABRed2/497P), the trial judge was not addressing whether the Draft ASX Announcement was before the board on 15 February 2001. His Honour had already addressed that at LJ[182]-[219], (ABRed2/457J-466X) and found that it was. This finding was upheld by the Court of Appeal (at CA[383] ABWhi/78.20). Instead, at LJ[327] (ABRed2/497P) the trial judge was simply explaining how the evidence of that conversation and Allens' inaction was consistent with his findings.

106. The Court of Appeal was also critical of the trial judge's conclusion in LJ[327] (ABRed2/497P) that Mr Cameron accepted the advice of Mr Macdonald that the MRCF was fully funded. The Court of Appeal asked: "*If they had not had time to absorb that advice why would they have accepted the language of full funding on the say so of Mr Macdonald?*" (CA[357]; ABWhi/73.32).

107. The answer is twofold. First, Allens were not to be imputed with expert knowledge as to the impact of the absence of claims data upon the actuarial advice. As lawyers, they were entitled to rely upon Mr Macdonald's *"say so"* as he could be supposed to have a greater knowledge of the matter than them. Second, as a matter of fact, they did accept the assurance of full funding in that neither of the Allens' copies of the Draft ASX Announcement contains any annotation that waters down the assurance that the MRCF was fully funded. Nor did the Final ASX Announcement.

108. At LJ[329] (ABRed2/498O), the trial judge speculated that Messrs Cameron and Robb held back at the meeting on expressing a view on the content of the Draft ASX

Announcement because of the need to consider the *"new development"*, namely the realisation that Trowbridge had not considered new claims data. His Honour noted that *"Mr Robb had the opportunity later that day to give his view of the document."* At CA[357] (ABWhi/73.34), the Court of Appeal was critical of this reasoning asking whether in that circumstance "*would not a solicitor*" have "*advised the Board not to approve the draft news release as an ASX Announcement until he was in a position to provide advice*". This reasoning has no application to the position of either Mr Cameron or Mr Robb. By a consideration of the annotations on the two Allens copies of the Draft ASX Announcement, and the fact that a misleading Final ASX Announcement was released, it can safely be concluded that Allens did not give any advice cautioning against the issue of an emphatically worded announcement to the ASX. Nothing in their conduct or the subsequent changes, which may or may not have been made as a result of their advice, detracts from the conclusion that the board gave its approval to the Draft ASX Announcement as recorded in the minutes.

109. Once the minutes are given their proper weight then the speculation by the Court of Appeal that the board considered the Draft ASX Announcement as a "*work in progress*" or by giving "*approval in principle*" (that differs in substance from the minutes) falls away. No witness supported such a possibility. The post meeting changes were not of significance, and the procedure outlined by Mr Baxter at CA[333]-[335] (ABWhi/69.25-69.44) accommodated such changes. Such speculation that can be engaged in by reason of the annotations to the copies that were produced to ASIC by Allens only suggests that neither Mr Peter Cameron nor Mr Robb had or expressed any concerns with the assurances of full funding, and would not have cautioned against the board approving the Draft ASX Announcement.

Correlation (Ground 6)

110. In his affidavit, Mr Brown recalled that during the board meeting on 15 February 2001 he inquired of Mr Macdonald as to the suitability of the Trowbridge report as a basis for concluding that the funds were sufficient. Mr Brown stated that he was advised: *"If we can't tell all of the interested stakeholders that there will be enough funds we will have great difficulty getting acceptance of the plan and it won't work."* (LJ[149] ABRed2/449B). In cross-examination Mr Brown agreed he understood this to be a reference to the *"press release statements and the statements that would go to other interested stakeholders"* (ABBla3/1328K). Mr Brown was asked about his dissatisfaction with the communication strategy suggested in the board papers for the 15 February 2001 board meeting. He agreed that it was his expectation that in announcing the separation a message would be conveyed to the market that asbestos claims would be *"fully funded"* (LJ[144] ABRed2/447Q; ABBla3/1324B-G). This led to a series of questions as to whether it was *"likely"* that management advised the meeting that various statements would be conveyed to the market in terms that reflected the Draft ASX Announcement (ABBla3/1336U-1357 esp at ABBla3/1339E-1341V). The trial judge summarised Mr Brown's evidence on this at LJ[144]-[161] (ABRed2/447Q-451X). During cross-examination, Mr Koffel (who attended by telephone) agreed that matters outlined in the Draft ASX Announcement could have been stated in the meeting. The trial judge summarised this evidence at LJ[177] (ABRed2/455Q).

111. The trial judge relied on Mr Brown's evidence (and Mr Koffel's to a *"lesser extent"*) as partial support for accepting that Mr Baxter took with him a version of a draft ASX announcement to the meeting (LJ[193]-[194] ABRed2/460J-U). Later in his judgment,

after having found that the Draft ASX Announcement was the version taken to the meeting and distributed to those present (LJ[221] ABRed2/467J), the trial judge found that one or other or both of Mr Macdonald or Mr Baxter spoke to the board *"and put the statement as the key messages to be communicated to the market set out in that document"* (LJ[223] ABRed2/467R). His Honour made this finding by reference to what Mr Brown had agreed *"was likely to have been stated"* to the board meeting (and *"to a lesser extent"* what Mr Koffel agreed what *"might have been stated"*) (LJ[223] ABRed2/467R). The trial judge found that there was a *"strong correlation"* between what Mr Brown had agreed was likely to have been stated and the content of the competing versions of the form of announcement that were taken to the meeting (LJ[194] ABRed2/460P).

112. The Court of Appeal overturned this finding and instead found that the correlation was weak (CA[420] ABWhi/85.49). The first reason was its characterisation of Mr Brown's evidence as involving speculation and not being based on recollection (CA[409] ABWhi/84.01). The second reason was its assessment that ASIC had not excluded the management slides as the source of the statements put to and accepted by Mr Brown as likely to have been stated (CA[418]-[420] ABWhi/85.22-86.03).

113. The Court of Appeal did not identify any particular part of Mr Brown's evidence which involved speculation. The Court referred to a specific question and answer (CA[405] ABWhi/83.20), then set out the respondents' assertions as to the effect of that answer (CA[406] ABWhi/83.31) and Mr Brown's evidence generally (CA[406], ABWhi/83.31). The Court noted that the trial judge *"saw and heard Mr Brown give his evidence"* (CA[408] ABWhi/83.47), and concluded (CA[409] ABWhi/84.01):

> "*A question or answer in terms of likelihood has inherent difficulty. It may represent a best but uncertain recollection. It may represent reconstruction from other matters. Or it may represent no more than acceptance of a possibility where recollection is empty. We do not think that recollection lay behind Mr Brown's answers involving likelihood, nor was a basis laid for reconstruction. It would be remarkable if Mr Brown had a recollection, even an uncertain one, which enabled him to agree to the rather lengthy statements put to him, when he had indeed made clear (and the judge appears to have accepted) that he did not recall the words in which management described the messages to the market.*" (emphasis added)

114. ASIC submits that whether or not the answer to a question which is addressed in terms of likelihood represents any of the options identified in this extract, or represents an actual if not precise recollection, is essentially a matter of judgment and one in respect of which a trial judge has a distinct advantage over an appellate court. In this case, the trial judge had the benefit of hearing and observing Mr Brown give his evidence over 5 days and considering that evidence in the context of the documents that were shown to him. This was an advantage which the Court of Appeal did not enjoy.

115. The difference between the positions occupied by the trial judge and the Court of Appeal is exemplified by the last sentence of CA[409] (ABWhi/84.01) extracted at [113] above. This sentence refers to a summary of part of Mr Brown's evidence given by the trial judge which observed that Mr Brown's evidence was, inter alia, that *"he did not recall the words used by management to describe the message to the market"*

(LJ[146] ABRed2/448L). The actual question and answer which the trial judge summarised at LJ[146] (ABRed2/448L) was as follows (ABBla3/1338I-L):

> "*Q.* *In other words, what I want to suggest to you - you agree, don't you - management indicated what it was proposing to say and the Board indicated that it approved of that?*
>
> *A.* *Yes. I don't recall the specific terms that management used in describing the communications, but, in principle, your suggestion or statement is correct.*" (emphasis added)

116. Immediately after this answer, Mr Brown was asked the questions prefaced with the word *"likely"* as summarised by the trial judge at LJ[153]-[160] (ABRed2/449R-451P; ABBla3/1338T-1341J).

117. The Court of Appeal relied on a summary of Mr Brown's evidence given by the trial judge in an early part of his judgment and took it out of context to support a finding that Mr Brown's evidence was not based on an actual recollection. To the contrary, a review of that answer and the entirety of Mr Brown's evidence confirms that Mr Brown had an actual recollection of the effect of what he was advised would be conveyed to the market, if not the precise words (or *"specific terms"*), and, in particular, recalled that the message to be conveyed was stronger than that suggested in the board papers or management slides.[68] Contrary to the Court of Appeal's analysis, the uncertainty in Mr Brown's evidence revealed by the word *"likely"* was not whether the relevant matter was discussed or the effect of what was discussed, but only whether he could *"specifically recall"* the *"precise terms"* of what was discussed. The question and answer extracted at

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[68] "*I believe there was significant discussion about the communication of the Foundation to all outside parties*" (ABBla3/1323B-C). "*The board, I believe, discussed the overall communications strategy and the key messages and the communications with stakeholders*" (ABBla3/1324S-T). "*Q. You were satisfied that what was said as to the proposed terms of the communication to the market accorded with what you expected should be said? A. I believe so, sir, yes*" (ABBla3/1337H-J). "*Q. Do you agree that one of the other key messages identified by management to be conveyed in the communication was that James Hardie sought expert advice from a number of firms, including actuaries Trowbridge, Access Economics and PricewaterhouseCoopers? A Yes, sir*" (ABBla3/1340R-U; note question does not use phrase "likely"). "*I would agree that the levels of assurance that we received in the meeting about the sufficiency of funding are stronger than what is implied in these key messages [being the management slide presentation]*" (ABBla3/1342O-Q). "*Q. I suggest to you that it was conveyed to you at the meeting that that was one of the key messages, in terms of that paragraph, namely "JHIL's CEO, Mr Peter Macdonald said that the establishment of a fully funded foundation provided the best resolution for all stakeholders", firstly: you accept that, don't you? A. I can only respond to your question by saying that to the effect that words along those lines were spoken - I don't specifically recall - but it would be in the context that the board understood what that term meant, by reference to its previous discussions, but that didn't mean to say that it was a suitable term to be using with an external audience*" (ABBla3/1351G-M).
"*.... I believe that the shorthand way that was developed in that meeting was to say it was fully funded ....*" (ABBla3/1338C); "*... I think there would have been a discussion of certainty and – but I can't be explicit as to the exact way in which it was used*" (ABBla 3/1353E). When asked about what was proposed to be discussed at the telephone conference arranged for the directors on 20 February 2001 as a follow up to their board meeting (CA[501]-[531] ABWhi/176.26-183.49) "*Q. I think you have already agreed that the discussion at the meeting to agree to have this conference was to consider the response to the separation announcement in the context of what had been indicated at the board as to what that announcement would contain? A. In broad terms, sir, yes, and not only the announcement of course, but also the plans, as I recall and have been refreshed, to make contact with various members of government, unions, claimants' groups and so forth.*" (ABBla3/1362I-N) (emphasis added).

CA[405] (ABWhi/83.20) confirm this. Mr Brown stated that he did not *"specifically recall the words"*, but after clarifying the word *"likely"* confirmed that *"there would have been a discussion of certainty"*.

118. The advantages enjoyed by the trial judge over the Court of Appeal are also exemplified by the second aspect upon which the latter overturned the trial judge's correlation finding. The trial judge found that that the evidence given by Mr Brown as to what it was likely that management conveyed were to be the key messages to be communicated to the market was only referable to the various versions of the ASX announcement, and not to any other document (LJ[194] ABRed2/460P), such as the board papers or a slide presentation made to the board. The trial judge noted that "[n]*obody suggested any other document as the source of the correlative statements*" (LJ[194] ABRed2/460P).

119. The Court of Appeal noted the evidence of Mr Brown in which he agreed that the board was advised that what would be communicated to the market was more emphatic than that stated in the slide presentation, and that he could not point to any other document as the source of the statements that were made (CA[415]-[416] ABWhi/84.42-85.09). The Court nevertheless considered that this did not *"exclude the slides were the documentary source but were spoken to in stronger terms"*, and concluded that it *"does not seem likely that, instead of the structured presentation, management would effectively read out, as the key messages, paragraphs from the draft news release"* (CA[417] ABWhi/85.10). The Court concluded that the key messages referred to by Mr Brown "*could readily be seen as sourced*" in the slide presentation (CA[418] ABWhi/85.23), and ultimately that the *"correlation with the draft new release seen by* [the trial judge] *is in our view weak"* (CA[420] ABWhi/85.49).

120. ASIC submits that this aspect of the reasoning of the Court of Appeal fails to acknowledge the distinct advantages that were enjoyed by the trial judge and is otherwise erroneous.

121. First, it ignores the fact that no submission was made by any of the parties at trial that there was a correlation with the slide presentation as opposed to the content of the Draft ASX Announcement. This was recorded by the trial judge at LJ[194] (ABRed2/460P). That contention emerged for the first time on appeal (ABOral/51 at [53]). At CA[413] (ABWhi/84.32), the Court notes that the trial judge did not *"undertake this analysis"* which appears to be a reference to the task of comparing Mr Brown's answers with the terms of the slide presentation. Consistent with LJ[194] (ABRed2/460P), the trial judge did not undertake that analysis because his Honour was not asked to by any of the parties.

122. Second, the Court of Appeal's review of Mr Brown's evidence at CA[414]-[416] (ABWhi/84.36-85.09) suggests that the trial judge did not accurately record the effect of Mr Brown's evidence when he found at LJ[161] (ABRed2/451P) that Mr Brown *"could not point to any document other than the Draft ASX Announcement as to the source of the statements as to the key messages to be conveyed to the market"*. This is exactly what Mr Brown said in his evidence at ABBla3/1354V (and explains the absence of any submission to the trial judge that the slides were the source of the statements he agreed were *"likely"* to have been made).

123. Third, the Court of Appeal twice queries why management would address the meeting on the terms of the Draft ASX Announcement when the topic of key messages and

communication was addressed in the management slides (CA[412] ABWhi/84.20 and CA[417] ABWhi/85.10). The answer is in the Court's own findings and the evidence of Mr Brown. The Court upheld the finding of the trial judge that the Draft ASX Announcement was taken to the board meeting by Mr Baxter (CA[383] ABWhi/78.26). Mr Baxter's emails immediately prior to the meeting reveal urgent activity to have a draft announcement before the meeting (see LJ[109]-[110] ABRed2/430R-431J and CA[203]-[204] ABWhi/45.17-45.32). The only possible scenarios adverted to by the Court of Appeal that are consistent with the Draft ASX Announcement being both taken to the meeting but not the subject of a resolution are that it "*was taken to the board as a work in progress, or for some kind of approval in principle*" (CA[790] ABWhi/146.38; addressed above). However, each of those possibilities (as well as a scenario involving approval as pleaded by ASIC) means that, contrary to the analysis in CA[417] (ABWhi/85.10), it is likely that management, especially Mr Baxter, spoke to the announcement. As agreed by Mr Brown, the *"messages"* as stated in the slides were not sufficient to assuage stakeholder concern (ABBla3/1342Q-V). Mr Baxter brought to the meeting a statement that was sufficient, and that difference would need explaining. In that context, it was overwhelmingly likely that copies were distributed and its content outlined at the meeting.

124. Fourth, in any event, the conclusion that there is a correlation between Mr Brown's evidence and the slides that the Court of Appeal identified cannot be sustained. Accompanying these submissions is a table comparing the relevant statements in the Draft ASX Announcement, the trial judge's findings, the Court of Appeal's analysis and extracts from the transcript. The critical point overlooked by the Court of Appeal is the starting and end point of this aspect of the cross-examination of Mr Brown, namely his belief that the messages in the board papers (ABBla3/1324B-G and Q-V) and slide presentation (ABBla3/1342M-Q) did not convey a sufficiently emphatic message as to the sufficiency of funding. At best, the Court of Appeal's analysis only leads to the conclusion that some of the *"topics"* in the Draft ASX Announcement were addressed in the slides. Moreover, Mr Brown stated that the phrases *"fully funded"* and *"certainty"* were used in the meeting (ABBla3/337V-1338F: *"fully funded"*; ABBla3/1353E: *"certainty"*), although he queried their meaning. Those phrases do not appear in the slide presentation.

125. In *Fox v Percy* at [23] Gleeson CJ noted a number of the distinct advantages enjoyed by a trial judge over an appellate court, including not only the evaluation of witness credibility and the *"feeling of a case"*, but also the opportunity *"to receive and consider the entirety of the evidence"* and *"to reflect upon the evidence"*.[69] All these advantages were enjoyed by the trial judge, yet the Court of Appeal did not identify any reason of the kind or analogous to those referred to in *Fox v Percy* at [28]-[29] for the rejection of the trial judge's assessment of Mr Brown's evidence.

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[69] In *Seiwa Australia Pty Ltd v Beard* (2009) 75 NSWLR 74; [2009] NSWCA 240 at [154] Campbell JA concluded that with "*any factual finding of a trial judge that is affected by **any** of the different ways in which the trial judge has an advantage over the appellate court, there needs to be a reason, such as those identified in 128 [28] and [29] of* Fox v Percy *that explains why it is that an appellate judge is satisfied, notwithstanding the circumstance that would usually give the trial judge an advantage, that there is error in the finding*" (emphasis in original).

126. Finally, the position of Mr Koffel should be noted. The trial judge summarised the relevant part of Mr Koffel's evidence at LJ[177] (ABRed2/455P). The Court of Appeal's analysis at CA[423]-[424] (ABWhi/86.17-86.35) overstates the trial judge's reliance on that evidence. At LJ[194] (ABRed2/460P), the trial judge only referred to it as evidence as to what statements "*could have been made*", and at LJ[223] (ABRed2/467R) as to what "*might have been stated*". The trial judge did not use it as positive evidence of what was said, but merely noted that Mr Koffel's evidence was not inconsistent with his findings and the parts of Mr Brown's evidence upon which his Honour relied.

COURT OF APPEAL ERRED IN ITS APPROACH TO ASIC'S EVIDENCE CONCERNING THE DISTRIBUTION OF THE DRAFT ASX ANNOUNCEMENT (GROUNDS 8 AND 9)

127. The minutes are not only powerful evidence that a resolution was passed in the terms recorded, but also that a document was *"tabled"* (to the extent that needs to be shown). The only further step that ASIC needed to prove its case was to establish which document was the subject of the resolution. ASIC nominated the Draft ASX Announcement (without the text boxes) (LJ[129] ABRed2/443L). ASIC sought to prove that that document was taken to the 15 February 2011 board meeting and copies were distributed to members of the board (and others) who were present.

128. As noted above, the trial judge found that (a) Mr Baxter took the Draft ASX Announcement to the board meeting; and (b) copies were distributed to those present including the non-executive directors, Mr Peter Cameron and Mr Robb (LJ[220] ABRed2/467D). The Court of Appeal expressly upheld the trial judge's finding that Mr Baxter took the Draft ASX Announcement to the meeting, and that Messrs Robb and Peter Cameron received copies at the meeting (CA[383] ABWhi/78.20). The Court did not overturn the finding that copies were distributed to the non-executive directors, although with two matters it expressed doubt as to the basis upon which the trial judge made that finding, namely the production of identical copies by BIL Australia Pty Ltd (**BIL**) (CA[382]-[384] ABWhi/78.08-78.36) and the evidence of one of JHIL's company secretaries, Mr Donald Cameron (CA[377]-[381] ABWhi/77.01-78.08). These are the subject of ASIC's two defensive grounds of appeal.

129. In addressing these grounds, it is necessary first to briefly identify the material relied on by ASIC to establish which version of a draft of an ASX announcement was taken to and distributed at the meeting, and the trial judge's reasons.

130. The trial judge noted that there was no challenge to Mr Baxter's evidence that he took a document to the meeting (LJ[193] ABRed2/460J), and identified the competing possibilities as the Draft ASX Announcement, the Draft ASX Announcement with the text boxes (i.e. as attached to Mr Baxter's email of 7.24am) and a version attached to an email sent to Mr Baxter at 9.35am on 15 February 2001 (**9.35am draft announcement**) (LJ[194] ABRed2/460P). In contending that the Draft ASX Announcement was distributed to those present at the board meeting, ASIC relied upon Mr Baxter's email sent at 7.24am on 15 February which announced that the version attached to that email was "*the version I will take to the Bd meeting*", Mr Baxter's evidence that he took copies to the meeting, and the fact that two identical copies (including typographical errors) were subsequently produced to ASIC by Allens and another identical version was produced by BIL. As noted above, the two copies produced by Allens bore handwritten annotations of Messrs Peter Cameron and Robb. BIL was a company associated with

the non-executive directors, Messrs O'Brien and Terry (LJ[196] ABRed2/461G). The trial judge accepted these matters as establishing that copies of the Draft ASX Announcement were taken to the meeting and copies distributed to those present (LJ[220]; ABRed2/467D).

131. The production by Allens and BIL of identical copies of the Draft ASX Announcement assumes even greater significance when two further matters are considered. First, as found by the trial judge at LJ[209] (ABRed2/464O):

> *"A copy of the Draft ASX Announcement was not produced from the records of JHIL. Mr Donald Cameron said it was his practice at the conclusion of each board meeting to collect such of the board packs from directors as he was able to locate which he subsequently destroyed except for the copy to be filed in the board records. But he did not keep copies of draft announcements to the ASX. He kept only the one that went to the ASX and they were kept in a separate file. He said because there might be several drafts before the final version, all the earlier drafts were destroyed."*

132. The significance of this is that it explains why neither Allens nor BIL could have obtained copies of the Draft ASX Announcement from JHIL's board papers (and explains why no copy was retained with the board papers).

133. Second, it is necessary to note the timeline of the production of the various drafts of the announcement from the evening of 14 February 2001 to the publication of the Final ASX Announcement on the morning of 16 February 2001. This was partially addressed by the Court of Appeal at CA[189]-[218] (ABWhi/40.46-50.03). The relevant communications are those at items 57, 60, 61, 65, 66, 67, 68, 71, 72, 73, 74 and 75 of ASICs chronology. What emerges from that timeline is that as early as 1.11pm on 15 February 2001, 21 minutes after the end of the board meeting, the version that was being circulated within JHIL was the 9.35am draft announcement (item 66). It was this version that was subsequently amended (CA[215] ABWhi/48.27). The significance is that Allens and BIL could not have obtained copies of the Draft ASX Announcement after the meeting as that version was no longer in circulation. The trial judge so reasoned in relation to the receipt of the Draft ASX announcement by Allens (LJ[219] ABRed2/466R). The same reasoning applies to the copy produced by BIL.

134. Before the Court of Appeal, there was debate as to whether the trial judge had correctly summarised the effect of Mr Cameron's evidence as summarised in the extract above (CA[379] ABWhi/77.37). However, the Court disregarded Mr Cameron's evidence on the basis that he was not referring to the period in early 2001 when the board meeting occurred (CA[380]-[381] ABWhi/77.46-78.07). No such contention was raised by any party before the trial judge or the Court of Appeal, and the Court of Appeal did not raise it with any of the parties. With respect, the Court was clearly wrong, because Mr Cameron was referring to that period. In his outline of evidence, Mr Cameron explained that he was the company secretary of JHIL from 1994 to 1998, and then joint company secretary (with Mr Shafron) of JHIL from 17 November 1999 to 18 September 2001 (ABBlu12/5229 at [7]). Mr Cameron described the practice in relation to the retention of announcements released to the ASX, including those considered at board level "*in both [his] first and second periods as secretary of JHIL*" (ABBlu12/5235 at [22]-[23]). The cross-examination extracted at CA[378] ABWhi/77.09 was immediately preceded with questions directed towards that part of Mr Cameron's statement that concerned the

practice he described in a period that included 2001 (ABBla1/172L-P), and his retention of documents from the February 2001 meeting for filing (ABBla1/172-173 referring to [151] of his statement: ABBlu12/5284K).

135. In relation to the production by BIL to ASIC of an identical copy of the Draft ASX Announcement, the trial judge found that *"there [was] no reason why Mr O'Brien or Mr Terry would have received the document from Mr Baxter after the meeting"* (LJ[214] ABRed2/465N). The Court of Appeal briefly addressed this at CA[382] ABWhi/78.03, speculating that a *"copy of the draft news release could have come into BIL's possession in the course of the Jackson Inquiry"*, and later suggesting without further explanation that *"production by BIL does not significantly support that it was given to Mr O'Brien or Mr Terry at the meeting."* (CA[384] ABWhi/78.31).

136. The possibility that BIL, Mr O'Brien or Mr Terry might have come into possession of the Draft ASX Announcement during the course of the Jackson Inquiry was not raised by any party before either the trial judge or the Court of Appeal, nor did the Court of Appeal raise it with any of the parties. It is pure speculation that was contrary to the evidence for two reasons. First, the Court of Appeal appears to have confused the position of Messrs O'Brien and Terry with that of Ms Hellicar and Mr Brown. At the time of the Jackson Inquiry (2004), Ms Hellicar and Mr Brown were directors of the new holding company of the James Hardie group, JHINV, and gave evidence before the trial judge that they received and retained documents to assist them with the course of the inquiry which they later produced to ASIC (ABBlu13/5780 at [291]; ABBlu13/5842 at [43]). Those documents did not include the Draft ASX Announcement. Messrs Terry and O'Brien resigned from the JHIL board in April 2001 and did not have any involvement with the group after that time (ABBlu9/4135Q-T). There was no evidence that either Mr Terry or Mr O'Brien received any documents during the course of the Jackson Inquiry, and there is no reason why they should have, given their lack of continuing involvement. Second, consistent with the evidence of Mr Donald Cameron as found by the trial judge at LJ[209] (ABRed2/464N), JHIL did not retain copies of the Draft ASX Announcement, and thus could not provide it to BIL at any later time. JHIL itself did not produce any copy of the Draft ASX Announcement to ASIC other than in *"mark up"* version as an attachment to Mr Baxter's email, sent at 7.24am (ABBlu5/2086).

GROUND 12 (MESSRS O'BRIEN AND TERRY ONLY)

137. Ground 12 of the notices of appeal concerns a separate cross-appeal by ASIC to the Court of Appeal from a costs order made by the trial judge between ASIC and Messrs O'Brien and Terry. It fell away in the Court of Appeal, once the Court set aside the contravention found against them, and was not otherwise addressed (CA[1155]; ABWhi/226.27). If ASIC were successful in overturning the setting aside of the contravention, ASIC submits that this should be remitted back to the Court of Appeal along with the balance of their grounds of appeals against the trial judge's orders concerning relief from liability, disqualification and pecuniary penalty (proposed orders 13(b)(iii) ABGre/39.4 and, in the alternative, 13(c) ABGre/39.9).

PART VII: LEGISLATION

138. The applicable legislative provisions are:

(a) s 180 of the *Corporations Law* as in force on 15 February 2001;

(b) ss 180 and 1400 of the *Corporations Act* as in force on 15 July 2001 (when the *Corporations Act* commenced); and

(c) ss 1317J to 1317S of the *Corporations Act* as in force on 14 February 2007 (when ASIC commenced proceedings against the respondents in the Supreme Court of New South Wales).

139. The *Corporations Law* was set out in s 82 of the *Corporations Act 1989* (Cth). That Act was repealed by s 3 and cl 2 of Schedule 1 to the *Corporations (Repeals, Consequentials and Transitionals) Act 2001* (Cth) when the *Corporations Act* commenced.

140. The *Corporations Act* commenced on 15 July 2001. Pursuant to s 1400(2) of the *Corporations Act*, on that date a person who had incurred a liability for a breach of s 180(1) of the *Corporations Law* incurred an equivalent liability for a breach of s 180(1) of the *Corporations Act*.

141. Copies of each of the legislative provisions set out above are attached as an annexure. Sections 180, 1317J to 1317S and 1400 of the *Corporations Act* are still in force in the form annexed.

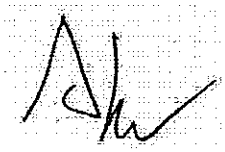
PART VIII: ORDERS SOUGHT

142. In relation to each of the respondents, if the Court of Appeal's overturning of the trial judge's approval finding is set aside and the trial judge's finding upheld, then it follows from the Court of Appeal's findings on breach (CA[810] ABWhi/152.38, CA[831] ABWhi/157.45, CA[863] ABWhi/163.04 and CA[940] ABWhi/184.07) that the declarations of contravention made by the trial judge should be restored. The only outstanding questions for the non-executive director respondents would be the determination of the balance of their appeals against the refusal of the trial judge to relieve them from liability and the penalties (including disqualification) imposed (as well as ASIC's cross-appeal on costs in relation to Messrs Terry and O'Brien noted in [137] above). Hence, in relation to Ms Hellicar and Messrs Brown, Gillfillan, Koffel and Willcox, ASIC seeks the orders sought in sub-paragraphs 12(a), (b) and (e) of its notices of appeal (with 12(c) and (d) being alternatives) (ABGre/48.30-49.15). In relation to Messrs O'Brien and Terry, ASIC seeks the orders in sub-paragraphs 13(a), (b) and (e) of its notices of appeal (with 13(c) and (d) being alternatives) (ABGre/38.3-39.20).

143. In relation to Mr Shafron, ASIC seeks the setting aside of the orders of the Court of Appeal allowing the appeal from the trial judge's declaration in relation to the ASX announcement contravention and the orders made by the Court on 6 May 2011. This would enable the question of the appropriate sanction to be reconsidered in light of all the contraventions that are found against him, and the balance of Mr Shafron's grounds of appeal, if any, concerning relief from liability and the sanction imposed for the contravention in relation to the Draft ASX Announcement. ASIC seeks the orders in

sub-paragraphs 12(a), (b), (c) and (f) of its notice of appeal (with 12(d) and (e) being alternatives) (ABGre/31.30-32.23).

Dated 23 June 2011



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