ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S175 of 2011

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

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

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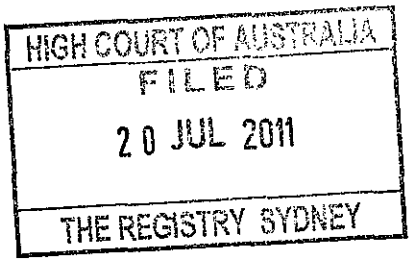

GREGORY JAMES TERRY
Respondent

RESPONDENT'S SUBMISSIONS

Date of filing: 20 July 2011
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Part I: Publication of Submissions

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

Part II: Issues Arising in the Appeal

2. The respondent contends that the primary issue on appeal is the issue identified in paragraph 2(c) of the appellant's written submissions dated 23 June 2011 ("**AS**"). The issues identified in paragraphs 2(a) and 2(b) of the appellant's submissions are subsidiary issues, for the reasons identified in paragraphs [14]-[18] and [58] below. Further, the respondent agrees with Ms Hellicar, Mr Brown, Mr Gillfillan and Mr Koffel (the **Hellicar Respondents**) that the manner in which the issue in paragraph 2(b) has been framed by the appellant (**ASIC**) is too narrow, and the respondent adopts the formulation of the issue proposed by the Hellicar Respondents in paragraph 2 of their written submissions. Finally, the issue identified in paragraph 2(d) of ASIC's submissions is wholly consequential upon ASIC succeeding in respect of the issue identified in paragraph 2(c), and is not the subject of any separate submissions.

Part III: Notices under Section 78B of the *Judiciary Act 1903*

3. The respondent agrees with ASIC that this matter does not require the issue of a notice under s78B of the *Judiciary Act 1903* (Cth).

Part IV: Material Facts

4. The respondent agrees with the Hellicar Respondents that ASIC's summary of facts fails to fully set out the context in which this matter has come to the High Court, and adopts the submissions of the Hellicar Respondents and the other respondents in this regard.

5. In addition, the respondent contends that ASIC's summary of the findings regarding the outcome of the January 2001 Board Meeting and the preparation for the February 2001 Board Meeting is incomplete in certain important respects.

6. ASIC's submissions suggest that the Board rejected the net assets proposal at the January 2001 Board Meeting because of a concern that this model would not be well received by stakeholders, and that work was done in the period leading up to the February 2001 Board Meeting to prepare a draft announcement which conveyed

certainty of funding, and thereby address the Board's concern regarding the need to neutralise potential stakeholder opposition (AS, [16]-[19]).

7. In fact, what the Board required, both on moral grounds and because of potential adverse reaction, was a separation model that involved there being *sufficiency* of funding for asbestos liabilities: CA[292], ABWhi/63.38. Sufficiency of funding was regarded as an actuarial matter, and was less than an assurance of full funding: CA[292] ABWhi/63.40. Accordingly, what was proposed to the Board at the February 2001 Board Meeting was more funding, not full funding: CA[293] ABWhi/63.45. The outcome was not presented to the Board as one of full funding, in that language or at all, and instead the Board was told that an assurance of full funding could not be given: CA[294] ABWhi/63.50.

8. In keeping with this proposal, the communications strategy in the board papers for the February 2001 Board Meeting emphasised that the company was *unable* to provide stakeholders with "any certainty that the funds set aside ... will be sufficient to meet all future claims": CA[294] ABWhi/64.5. So, instead, the strategy was to emphasise certainty that an amount of funds would be available for asbestos claimants, while recognizing the unreliability of an actuarially based assessment of sufficiency of funding, with the result that the company "cannot make a determination as to the adequacy of funding" and that "it may be that the assets available prove insufficient": CA[294] ABWhi/64.5-10.

9. The slides prepared for the February 2001 Board Meeting were consistent with the strategy outlined in the board papers. They also did not indicate full funding, but instead that the gross assets "should be sufficient", and the qualified assurance as to funding was reflected in the limited "key message" identified in the slides, namely that the Foundation "expects to have enough funds to pay all claims": CA[295] ABWhi/64.15-20.

10. ASIC led evidence from Mr Baxter that he had a specific recollection of presenting the communications slides, which include the "key messages" slide, to the February 2001 Board Meeting: Baxter [103], ABBlu10/4613T-U. Those slides are found at ABBlu5/2220-2227.

11. The evidence did not explain why it was that a message of *certainty* of sufficient funds was introduced at a late stage into the draft ASX announcement, particularly in circumstances where the communications strategy provided to the Board indicated

that it was not necessary that this be done, and moreover that it was not to be done: CA[298], ABWhi65.5.

12. As the separation proposal was presented to the Board, both in the board papers for the February 2001 Board Meeting and in the slide presentation given at that meeting, sufficiency of funding (let alone full funding) and certainty as to the adequacy of funding *were not going to be communicated*: CA[297], ABWhi/64.30-40.

Part V: Legislation

13. The respondent agrees that the applicable legislation is as set out by ASIC and annexed to its written submissions.

Part VI: Respondent's Argument

Introduction

14. It is common ground that:

(a) the critical issue of fact in this proceeding, upon which ASIC bore the onus of proof, was whether, at the February 2001 Board Meeting, a particular form of announcement (the Draft ASX Announcement) was tabled, and was the subject of a unanimous resolution that the company approve the particular announcement, and that it be executed and sent to the ASX: Fourth Further Amended Statement of Claim, [55] and [57], ABRed1/193-194;

(b) the relevant standard of proof was the civil standard and, in determining whether the standard was satisfied, the Court was to take into account the matters in s140(2) of the *Evidence Act*, which imported the principles enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and subsequent cases, including *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559; and

(c) ASIC had an obligation to conduct the proceeding against the respondent fairly, expressed by Griffith CJ as the "traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects": *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342.

15. The Court of Appeal found that ASIC had failed to establish the critical factual issue to the relevant standard. That finding had regard to the basic principle, derived from

Blatch v. Archer (1774) 98 ER 969 and *Briginshaw*, that a party seeking a serious finding must be diligent in calling available evidence, and the failure to do so adversely affects the cogency of the evidence presented by that party in the discharge of its onus of proof: CA[730]-[734], ABWhi/136.25-137.10. It is the application of that principle which supported the critical finding in the Court of Appeal's decision: "Having regard in particular to the failure to call Mr Robb, with consequences for the cogency of ASIC's case, we do not think ASIC discharged its burden of proof" (CA[796], ABWhi/147.45).

16. In turn, the application of this principle was supported by, but did not depend upon, the Court's finding that ASIC had failed to meet the required standard of fair dealing in its conduct of the proceeding, by reason of its failure to call a witness (Mr Robb) who was central to the critical factual issue. This is apparent from paragraph [795] of the Court of Appeal's judgment. There, the Court held that "[f]ailure of a party with the onus of proof to call an available and important witness, *the more so* if the failure is in breach of the obligation of fairness, counts against satisfaction on the balance of probabilities" (emphasis added): ABWhi/147.30.

17. The words "the more so" indicate in the clearest terms that, in the Court's view, the breach of the obligation of fairness was a matter that *reinforced*, rather than was the sole basis of, the Court's finding that ASIC had failed to establish the critical factual issue to the relevant standard.

18. ASIC is therefore wrong to contend (AS, [77], by reference to CA [789] – [796], ABWhi/146.25-147.45) that the finding that ASIC breached its obligation of fairness in failing to call Mr Robb was "critical to the ultimate finding". It was not. Rather, the failure to call Mr Robb was simply a matter that "tells against" achieving "comfortable" or "reasonable satisfaction": CA[795] ABWhi/147.37-40. This language makes it plain that the Court of Appeal was engaged in an orthodox analysis of the evidence and assessment of its weight and cogency; its conclusion was not dictated by the automatic application of a rule prescribing the consequences of a breach of obligation of fairness. Use of the expression "tells against" makes it clear that the Court of Appeal did not regard the failure to call Mr Robb as definitive or determinative. *A fortiori*, any breach of the admitted obligation of fairness was not "critical to the ultimate finding".

19. Significantly, ASIC does not challenge the Court of Appeal's articulation of the principles derived from *Blatch v Archer*, *Briginshaw v Briginshaw* and *Whitlam v*

ASIC. In relation to those principles, their application to this case, and ASIC's failure to discharge its onus of proof on the critical factual issue to the requisite standard, the respondent adopts the submissions of the Hellicar Respondents and the other respondents to ASIC's appeals. The only additional matters which the respondent emphasises in response to ASIC's submissions regarding the weight of the evidence and whether ASIC satisfied its burden relate to the significance of the "key messages" slides, and the significance of the BIL copy of the Draft ASX Announcement. These two topics are now addressed. Thereafter, the respondent replies to ASIC's submissions in relation to what the Court of Appeal described as, and ASIC accepted was, an obligation of fairness it was under in relation to the conduct of the civil penalty proceedings.

Key messages

20. In its written submissions, ASIC suggests that none of the respondents made any submission below to the effect that the likely source of the discussion of "key messages" at the board meeting, regarding which Mr Brown was asked questions, was the slides in the presentation to the Board at the meeting on 15 February 2001 (AS, [121]). The respondent did make submissions to this effect at first instance: ABBla8/3377M-3381W. Those submissions were to the effect that the Court should find that the discussion of "key messages" at that meeting proceeded in terms of those slides. Further, one of the respondent's grounds of appeal below was that, in light of the trial judge's finding that Mr Baxter made a presentation to the meeting in the terms of the relevant slides (including the "key messages" slide), and in light of the content of those slides, his Honour erred in relying on Mr Brown's speculation regarding the "likely" discussion of key messages at the February 2001 Board Meeting: ABRed3/955L-N.

21. As the respondent submitted below, the best indication of the discussion at the board meeting regarding the message that would be conveyed to the market concerning the establishment of the Foundation was the series of slides (numbered 23-30) regarding the communications strategy: ABBlu5/2220-2227. These slides were prepared for the February 2001 Board Meeting, and were only inserted into the slide presentation on the afternoon before that meeting: ABBlu5/1962F-H. ASIC led evidence from Mr Baxter that he specifically recalled presenting these slides to the Board at the February meeting: Baxter Affidavit, [103]; ABBlu10/4613T-U. In contrast, Mr Baxter confirmed that the draft announcement was not read aloud at that meeting,

and that he could not recall any discussion about the draft announcement at the board meeting: ABBla1/352T-U and 353G.

22. In those circumstances, the respondent submits, as it did below, that the most likely source for the discussion of the communications strategy and in particular the key messages to be presented to the market was the slides in the presentation which Mr Baxter recalled presenting, rather than the draft announcement which was not read out and which he could not recall being discussed.

23. Significantly, Mr Brown in giving his evidence made it clear that he could not recall the details of any such discussion of key messages, and his recollection that there had been such a discussion was refreshed by reviewing the Board papers which contained a section headed "Key messages": ABBla3/1330W-1331G.

24. Mr Brown frankly acknowledged that he had no recollection at all of the extent to which the "Key Messages" slide in the slide presentation was used, if it was used, at the February 2001 Board Meeting: ABBla3/1342O-P. It was against that background that Mr Brown agreed with the proposition put to him by counsel for ASIC that the messages which he had agreed were "likely" to have been conveyed to the Board were "clearer" than those in the "Key Messages" slide: ABBla3/1342G-H.

25. Significantly, the "Key messages" slide is couched in terms of language of "expectation" rather than "certainty", and Mr Brown emphasised that he would not, and did not, support any statement that it was certain that there would be sufficient funds: ABBla3/1340M-Q. In those circumstances, the statement in the "Key Messages" slide regarding an expectation based on actuarial estimates (rather than certainty) of sufficiency of funding is in fact entirely consistent with Mr Brown's understanding of the position.

26. Given those matters, the Court of Appeal correctly found that there was no sound basis for the trial judge to conclude that the discussion of key messages proceeded in terms of the Draft ASX Announcement, rather than the slides. ASIC's contention (AS, [123]) that it was "overwhelmingly likely" that Mr Baxter spoke to the announcement and outlined its content at the board meeting should be rejected.

27. As has already been outlined above, the use of the language of expectation, rather than certainty, in the "key messages" slide was entirely consistent with the communications strategy in the board papers that were prepared for the February meeting. According to both the board papers and the slide presentation given at that

meeting, sufficiency of funding (let alone full funding) and certainty as to the adequacy of funding *were not going to be communicated*: CA[297], ABWhi/64.30-40.

28. The Communications Strategy included in the February Board papers sets out, on its first page, the following fundamental limitation on the strategy being outlined (ABBlu4/1607O-P):

> *Our central communications conundrum is that we will not be able to provide key external stakeholders* with *any certainty* that the funds set aside to compensate victims of asbestos diseases will be sufficient to meet all future claims. (emphasis added)

29. This point is repeatedly emphasised in the extensive draft questions and answers that are set out in the Board papers, that is, the draft answers which the Board is informed will be given to questions by the media or stakeholders regarding the funding of the Foundation: ABBlu4/1627-1632. For example, the following questions and answers highlight this message (emphasis added):

> **1. How can James Hardie be confident that the Foundation has sufficient assets to meet all future claims?**
>
> The Foundation will start off with assets of $284 million...
>
> While *it is not possible to reliably measure what the total number or cost of claims will be*, we have used our 20 year experience of asbestos compensation and a range of independent projections to form the view that *there is a very real prospect* that all claims *can* be met. Under certain scenarios, *it is possible* to project that there will actually be a surplus once all claims are met.
>
> **2. What work has James Hardie undertaken to determine what future claims might be?**
>
> The company takes advice and attempts to stay abreast of developments in this area. *It has learnt that there is no certainty.*
>
> It has previously stated (note 29(ii) Accounts for Year ended 31 March 2000): "While certain Australian subsidiaries recognise that they will continue to be named as defendants in litigation in Australia as a result of past manufacturing and marketing of products containing asbestos, *James Hardie cannot measure reliably its exposure with respect to future asbestos-related claims*. The Directors rely on various internal and public reports and seek actuarial advice in assessing the ongoing exposure to claims. A contingent liability exists in respect of the ultimate cost of settlement of claims yet to be made *which cannot be measured reliably at the present point in time*."

The position has not changed – the Directors are still of the view that James Hardie cannot reliably measure the liability of [the subsidiaries] *to future asbestos-related claims. ...*

3. What does your actuarial advice say in relation to the ongoing exposure to claims?

We have learned that *actuarial advice is not a reliable basis for assessing these kinds of liabilities.* Within these limitations it can, however, provide a reference point which should be considered along with many other factors. ...

10

5. Will James Hardie provide extra funding to the Foundation should its initial funding prove to be insufficient?

...

It will not be known for very many years whether or not funding is sufficient. It is impossible to prove today whether any particular level of funding would be more or less than might be required. ...

9. Why does James Hardie think future claims will cost at least $284m?

...

20 *The ultimate cost of asbestos claims cannot be measured reliably at this time.* Neither James Hardie nor anyone else knows the future extent of [the subsidiaries'] liability, *nor is there any way to determine this with any certainty.* Therefore, *James Hardie cannot make a determination as to the adequacy of funding. ...*

21. What do you say to the 39 year old mother of three whose husband dies when there is no money left in the trust and James Hardie is not prepared to contribute more?

This is a scenario that *may* never arise. The Foundation has very significant
30 funding through [the subsidiaries'] substantial asset base, associated investment returns and access to insurance policies. These *should* result in funding *for very many years.* However, *neither we nor any one else knows the future extent of [the subsidiaries'] asbestos liability.*

30. The same message is conveyed by the draft questions and answers for the Foundation, which were also included in the Board papers (that is, the answers that the Foundation directors would provide to any questions asked of them). For example (ABBlu4/1639D-F):

5. Do the directors [of the Foundation] believe that the assets vested into the trust will be sufficient to meet all future claims for asbestos related disease?

That's our goal.

But there is no known way of calculating this with certainty.

31. The slide presentation for the February 2001 Board Meeting does not move away from the message repeatedly set out in the Q&A, but instead confirms it, stating that: "We have undertaken intensive media training to road test our Q&A and are confident we have credible selling messages": ABBlu5/2220.

32. Further, as noted above, the slide presentation identified the "Key Message" regarding sufficiency of funding as being an *expectation* on the part of the Foundation, rather than any statement of certainty on the part of JHIL: ABBlu5/2226.

33. In addition, the slides report on the public relations advice received from Mr Loosley, which is not to the effect that an unequivocal statement should be made, but is instead to the effect that the statement should be one of "likelihood" – that is, the company should argue "that the *most likely outcome* was that all claims would be met" (emphasis added): ABBlu5/2221.

34. Finally, the Board was informed that there had been a briefing with the chiefs of staff of the NSW Premier and Industrial Relations Minister, at which "all key messages" were discussed and "well understood", and the "key issues [were] teased out and discussed openly"; and that the briefing was "much more positive than expected": ABBlu5/2224.

35. In summary, the Board was informed that:

(a) the key message to be conveyed to stakeholders was one of "expectation" or "likelihood" rather than certainty;

(b) in response to any question about funding, the company would emphasise that the extent of asbestos liabilities and therefore the sufficiency of funding was uncertain;

(c) these key messages had been "road-tested" and management was "confident" they were "credible selling messages"; and

(d) these key messages were "well understood" by at least government stakeholders, whose reaction was positive.

36. There are six important points to note.

37. *First*, the communications strategy was clearly drafted with close reference to the proposal before the Board on 15 February 2001. The first answer in the Q&A refers to the Foundation being established with assets of $284m, which is identical to the figure that appears in the Draft ASX Announcement: ABBlu4/1627H-I.

38. *Secondly*, it was never suggested to any of the directors who gave evidence that the Board was at any stage provided with an alternative version of the Q&A or of the communications strategy.

39. *Thirdly*, there is no evidence that the Board was ever told that the detailed communications strategy set out in the Board papers had been abandoned, and no such proposition was put to any witness who had attended the February 2001 Board Meeting.

40. *Fourthly*, as noted above, the slide presentation for the February 2001 Board Meeting, far from suggesting that the strategy manifested in the Q&A had radically altered, instead states that management had "road tested" the Q&A and had confidence in the messages contained in it: ABBlu5/2220.

41. *Fifthly*, the statements in the detailed communications strategy are entirely consistent with JHIL's previously stated position:

(a) as stated to the public - in, for example, JHIL's accounts for the preceding financial year: "James Hardie cannot measure reliably its exposure with respect to future asbestos-related claims" (ABBlu2/789, note 29(ii)); and

(b) as stated to the Board - in, for example, Mr Macdonald's memorandum of 13 December 2000: "it is not possible today to accurately estimate the total likely asbestos cashflows" (ABBlu3/1208D-E).

42. *Sixthly*, the key messages in the slides are also consistent with the handwritten amendments on the Allens' copies of the Draft ASX Announcement, which have the effect of paring back the representation of certainty as to sufficiency of funding, and replacing it with one of an expected sufficiency based on an actuarial estimate: ABBlu5/2185 and 2187.

43. Given the matters outlined above, it is inherently unlikely that the respondents would have approved a public statement of JHIL that conveyed a statement of *certainty* that was *at odds* with the fundamental communications strategy set out in the Board papers; *at odds* with the current publicly stated position of the company; *at odds* with the apparent views of the company's lawyers as to what could be publicly stated; and *at odds* with the position as outlined to the Board by management. It is also inherently most unlikely that Messrs Cameron and Robb would have remained mute had the Board formally resolved to approve a document in the form of the Draft ASX Announcement that was so at odds with the matters noted above.

44. Certainly, if the Draft ASX Announcement had been formally approved in the face of this body of material, one would expect those present at the February 2001 Board Meeting to have a positive recollection of it: but no one, including Mr Baxter (who was called by ASIC and was responsible for external communications), gave any evidence to that effect. Nor did ASIC call Mr Robb, who attended the relevant part of the meeting, or lead any evidence from him that such a shift of strategy occurred in his and Mr Cameron's presence (and notwithstanding their views expressed in the handwritten amendments to the Draft ASX Announcement), or call him so as to allow his recollection regarding the presentation and discussion of the communication strategy to be explored and tested.

45. In those circumstances, the Court would more strongly draw the inference that no such change in the communications strategy occurred at the February Board Meeting. Such an inference is fatal to ASIC's case because formal approval of the Draft ASX Announcement is consistent only with a fundamental change in strategy in fact having occurred.

BIL copy

46. ASIC relies on the production by BIL Australia Pty Ltd (**BIL**) of a copy of the Draft ASX Announcement in its attempt to prove which document was the subject of the alleged resolution at the February meeting (AS, [127]). This highlights, as noted by the Hellicar Respondents, that the minutes of the meeting give no indication of the identity of the document said to be the subject of a resolution, such that the minutes cannot be an "exact proof" of the allegation that the board resolved that an announcement in the form of the Draft ASX Announcement be executed and sent to the ASX.

47. In order to make out its pleaded case, ASIC had to establish that the document the subject of the resolution was the Draft ASX Announcement, and that this form of announcement was "tabled" prior to their voting on the resolution: ABRed1/193H-J and 194L-Q (paragraphs [55]-[57] of the pleading). In response to a request by the respondent's solicitors for particulars of this allegation, ASIC stated, under cover of an email dated 20 June 2007, that "ASIC will seek to prove that copies were *provided* to those in attendance" (emphasis added). (ASIC made the same statement in response to a request from the solicitors for Messrs Brown, Gillfillan and Koffel and Ms Hellicar: ABOra2/719U-X, footnote 2.) The Court of Appeal found that the production of a copy of the Draft ASX Announcement by BIL did not significantly support ASIC's contention that it was distributed to the directors at the February meeting: CA[384], ABWhi/78.30-35.

48. In its written submissions, ASIC suggests (AS, [135]-[136]) that it is "pure speculation" that the BIL version of the draft announcement may have come into the possession of BIL or Mr O'Brien or Mr Terry other than in the course of the February 2001 Board Meeting, and that this possibility was not raised by the parties at first instance or before the Court of Appeal.

49. However, the respondent did make submissions to this effect (although not specifically submitting that one of the occasions on which the draft announcement may have come into their possession was in the course of the Jackson Inquiry): ABBla8/3357R-3360M (first instance submissions); ABOra1/466B-Q (Court of Appeal submissions.

50. The BIL version of the draft announcement bears the barcode **BIL.001.010.0058**: ABBlu5/2051. This barcode signifies that the document was produced to ASIC in August 2005 by BIL: Michael Taylor, [7]-[12]; ABBlu12/5334V-5336P.

51. Mr Taylor of ASIC agreed that all that the system of barcoding can convey is that, at the time the document was produced to ASIC, it was in the possession of the source party (being the person to whom a notice was addressed – in this case, BIL Australia Pty Ltd), but says nothing at all about the length of time that the document had been in the possession of the source party prior to production, or the circumstances in which it came into their possession: ABBla2/667D-L.

52. There is no basis for concluding that the document came into the hands of BIL via the respondent, as he was not a director of that company at any time, but was instead

a director of its holding company which was located overseas: Michael Taylor, [8]-[9]; ABBlu12/5335E-N.

53. As regards Mr O'Brien, who was a director of BIL Australia (Michael Taylor, [9]; ABBlu12/5335K-L), there is evidence to the effect that documents relating to JHIL came into his possession after he ceased to be a director of JHIL in late 2001: ABBlu10/4415. Mr Taylor agreed that he did not know on how many occasions, during the course of the James Hardie investigation, a recipient of a section 33 notice produced documents to ASIC in circumstances where, prior to production, they had obtained those documents from another party: ABBla2/668F-672T.

54. Even if the Court were to draw an inference that the document was in Mr O'Brien's possession in February 2001, there is no sound basis for drawing the conclusion that he must have received this document at the February 2001 Board Meeting. There is documentary evidence which shows that, in the period between the January 2001 Board Meeting and the February 2001 Board Meeting, Mr O'Brien had a direct line of communication with Mr Macdonald; that Mr O'Brien was specifically requesting that he be kept informed of work being undertaken by management in preparation for the February 2001 Board Meeting; and that, in satisfaction of this request, he was provided with material (including a draft of the February Board papers) by Mr Macdonald and discussed it with him. See, for example, an email of 1 February 2001 (ABBlu4/1434-1435) and two emails of 5 February 2001 (ABBlu4/1806-1811 and 1812).

55. Consequently, even if Mr O'Brien may have had a version of the draft announcement in his possession in around February 2001, that is not, of itself, capable of leading to the conclusion that all or any other members of the Board saw, discussed and approved that version of the draft announcement to be sent to the ASX.

56. ASIC is, in effect, asking the Court to infer that the BIL copy came into BIL's possession through it being in the possession of Mr O'Brien or the respondent; that it came into BIL's possession in August 2005 through having been in Mr O'Brien's or the respondent's possession in February 2001; that it came into the possession of one or other of them through distribution at the February 2001 Board Meeting; and that this establishes that the Draft ASX Announcement was tabled and copies were provided to all of the directors (other than the US-based directors). This falls within the realm of what was described in *Briginshaw v Briginshaw* as "inexact proofs, indefinite testimony, or indirect inferences", particularly in circumstances where no

witness who was present (including those called by ASIC) could recall the draft announcement being distributed to those present or discussed at the board meeting.

57. As the Court noted, Mr Robb could be expected to have indicated the manner in which and the time at which the identical Allens copies came into his possession, which could well have shed light on how (if at all) the BIL copy came into the possession of Mr O'Brien: CA[763], ABWhi/142.17-25. ASIC asks the inference to be drawn that both the Allens and BIL copies were received at the board meeting, by being distributed to all those present in the boardroom. However, in the absence of Mr Robb, and having regard to ASIC's failure to lead evidence from him on this issue and to allow such evidence to be tested, such an inference should not be drawn in respect of the BIL copy.

Obligation of fairness

58. For the reasons set out above (and paragraphs 15 to 18 in particular), as well as those advanced by the respondents to the other appeals, the respondent submits that it is not necessary for the Court to determine whether or not, in addition to failing to discharge its onus of proof on the critical factual issue, ASIC failed to discharge its admitted obligation to act fairly in its conduct of the proceeding against the respondent.

59. Insofar as the Court does consider it necessary to determine that issue, then these submissions address:

(a) the central importance of Mr Robb to the critical factual issue;

(b) the procedural history regarding ASIC's failure to call Mr Robb;

(c) the nature and content of the ASIC's obligation to act fairly in the conduct of its proceeding against the respondent;

(d) ASIC's failure to fulfill that obligation;

(e) the consequences of ASIC's failure to fulfill that obligation; and

(f) ASIC's criticisms of the Court of Appeal's articulation of its acknowledged obligation of fairness.

60. As a preliminary matter, however, the following points should be noted with regard to the obligation of fairness. *First*, ASIC admitted that it was under such an obligation. *Secondly*, it admitted that the obligation it was under extended beyond the ordinary obligations of a civil litigant and how a normal litigant is entitled to behave. *Thirdly*, it is hardly a startling proposition that a public regulator should act in a manner calculated to facilitate exposure of the true facts of a matter so that a proper and just result may follow: it scarcely furthers the public interest for those who assume the heavy but important obligations of corporate governance to be subject to findings of contravention with attendant heavy civil penalties on the basis of incomplete evidence on questions of fact that are central to any finding of liability. *Fourthly*, there is a significant body of Australian case law to this effect. *Fifthly*, the content of the admitted obligation must perforce be ambulatory, according to the facts of any given case. *Sixthly*, the consequences of non-compliance with the obligation of fairness will themselves vary with the facts of any given case. In the present case, they were hardly startling: an inference that was otherwise available in accordance with orthodox and unchallenged statements of principle derived from *Blatch, Briginshaw* and *Whitlam* was more confidently able to be drawn given the centrality of Mr Robb and the likely relevance of his evidence to the issue of fact that was central to ASIC's allegation of contravention.

Central importance of Mr Robb

61. ASIC quotes, and does not dispute, the Court of Appeal's description of Mr Robb as an "important material witness" who "would probably have knowledge on the issues", and was of "central significance to critical issues that had arisen in the proceedings" (AS, [70]).

62. Perhaps the most telling indication of the central significance of Mr Robb to ASIC's case is that ASIC, in its submissions before this Court, seeks the Court to draw numerous inferences regarding what Mr Robb thought, said and did (or did not do), in support of its case that the Board resolved at the February meeting to approve the Draft ASX Announcement, and to authorise its being executed and sent to the ASX. The inferences sought to be drawn and relied upon include that:

(a) Mr Robb "supervised" the drafting of the minutes of the February 2001 Board Meeting in advance of that meeting (AS, [20], [85(a)]), or was one of the persons who "prepared" those minutes (AS, [95]);

(b) "Allens" (presumably Mr Robb, but no person is specified) "reviewed" a draft of the minutes less than 2 hours before the February 2001 Board Meeting (AS, [95]);

(c) Mr Robb "reviewed" the minutes after that meeting (AS, [20]), and "charged for reviewing the minutes" (AS, [104]);

(d) Mr Robb had "responsibilities" concerning the "proper preparation" of the minutes (AS, [84]);

(e) "Allens" (presumably Mr Robb and Mr Cameron) did not "anticipat[e] a difficulty with the board approving a draft announcement [at the February 2001 Board Meeting], although it had not been vetted by Allens [prior to that meeting]" (AS, [95]);

(f) "Allens" (again, Mr Robb and Mr Cameron) did not have "expert knowledge as to the impact of the absence of claims data upon the actuarial advice" and "were entitled to rely upon Mr Macdonald's 'say so'" as to whether the Foundation was fully funded (AS, [107]);

(g) Allens (Mr Robb and Mr Cameron) "did accept the assurance of full funding [given to them by Mr Macdonald]" (AS, [107]);

(h) Allens (Mr Robb and Mr Cameron) "did not give any advice cautioning against the issue of an emphatically worded announcement to the ASX" (AS, [108]); and

(i) "neither Mr Peter Cameron nor Mr Robb had or expressed any concerns with the assurances of full funding [in the Draft ASX Announcement], and would not have cautioned against the board approving the Draft ASX Announcement" (AS, [109]).

63. Many of these matters include assertions of fact that are far from self-evident and simply do not flow as a matter of necessary inference. Moreover, all of these matters could have been the subject of evidence elicited from Mr Robb, had he been called by ASIC. His evidence may or may not have supported the conclusions asserted by ASIC to arise from inference. The point is that ASIC needs, as its submissions demonstrate, to rely on inferences about Mr Robb's conduct in circumstances where, as shall be seen below, it was in a position to call him but chose not to do so. It must

bear the consequences of its deliberate forensic strategy. Those consequences include a disinclination on the Court's part to draw inferences in its favour.

64. The particular issue of (and inference sought to be drawn by ASIC in relation to) whether or not Mr Robb (and Mr Cameron) advised against an announcement being issued in the terms of the Draft ASX Announcement is one that is of great significance to the main factual issue in the case. The annotated copies of the Draft ASX Announcement that were produced by Allens suggest, as the Court of Appeal found, that Mr Robb considered that the level of assurance of sufficient funding expressed in the Draft ASX Announcement should be reduced: CA[351], ABWhi/72.20. The two Allens copies are found at ABBlu5/2185 and 2187.

65. The changes made in the handwritten annotations are very significant in the context of the allegations in this case, as they include:

(a) moderating the language from that of certainty ("will have") to that of opinion ("is expected to have");

(b) making clear that this expectation was "on the basis of detailed actuarial analysis" or "on the basis of detailed analysis from actuaries"; and

(c) removing the representation that the funds were sufficient for "all" claims.

66. The fact that Allens suggested changes to the Draft ASX Announcement "brings considerable pause to a conclusion" that that form of announcement was approved for release to the ASX at the February board meeting: CA[358], ABWhi/73.40.

67. ASIC seeks to play down the significance of the amendments by noting that, although such amendments are made to the third paragraph of the Draft ASX Announcement, similar amendments are not made to other statements of certainty in the eleventh and thirteenth paragraphs, such that the announcement still conveyed such a message (AS, [103]-[104]). The submission appears to be that the Court should infer (in the absence of any evidence from Mr Robb) that, despite the handwritten amendments, Allens did not see any difficulty with a message of certainty of funding. However, if that were so, there would be no reason for Allens to have made any amendments at all.

68. An alternative, and more plausible, explanation for the disparity between treatment of the third paragraph, and of the eleventh and thirteenth paragraphs, is that the third

paragraph is the first occasion on which a representation as to certainty of funding is made. The inference is that Mr Robb recognised the problem with such a representation when it first appeared, and that any such representation needed to be pared back. That he did not go through and apply that to each other paragraph is explicable by the fact that he recognised, on his initial review of the text, that the document would need to be substantially amended. Alternatively, another available inference, also more plausible than the one ASIC urges, is that Mr Robb considered that, if the amendments to the third paragraph were made, a reasonable reader would interpret later paragraphs in light of the clarification that there was only an expectation of sufficiency of funding, based on actuarial analysis.

69. Given these competing inferences, and their relative likelihood, and having regard to ASIC's decision not to call Mr Robb despite tendering the Allens copies of the Draft ASX Announcement which contained his annotations, there was no error in the Court's finding that the handwritten amendments indicate a view on the part of the Allens that there was a need to amend the text of the Draft ASX Announcement so as to pare back level of assurance of sufficient funding expressed in the Draft ASX Announcement: CA[351], ABWhi/72.20.

70. Mr Robb was uniquely placed to give evidence about the two copies of the Draft ASX Announcement that bear his amendments and, in particular, evidence regarding the extent to which the amendments represent views that he held, whether such views were discussed with Mr Cameron and management, and whether those amendments record advice given by him to the company (and if so, on what occasion and in what terms).

71. The Court of Appeal found that Mr Robb and Mr Cameron received the two annotated copies of the Draft ASX Announcement from Mr Baxter at the time of February 2001 Board Meeting: CA[383], ABWhi/78.20. As discussed below, the Court noted, in making this finding that it did not follow that the draft announcement was distributed at the meeting, or discussed at the meeting (CA[384], ABWhi/78.30-35), and that it may well have been provided to them in order to support the claim for privilege flagged on the document, and in any event for their consideration and advice, as Allens had not previously vetted the announcement, and their advice was necessary: CA[382], ABWhi/78.10-15.

72. Putting together the Court's findings outlined above regarding the significance of the Allens amendments and the likely time of receipt of the Allens' copies of the Draft

ASX Announcement, it follows that, if the Allens partners had turned their minds to reviewing the text of the Draft ASX Announcement when it was provided to them at the time of the board meeting, then they would have considered that the text of that announcement needed to be amended, and in particular amendments needed to be made so as to pare back the level of assurance given regarding the sufficiency of funding.

73. If Mr Robb and/or Mr Cameron had reservations about an announcement being issued in the terms of the Draft ASX Announcement, on the basis that its assurance regarding the level of funding should be pared back, it is highly unlikely, and indeed implausible, that they would have refrained from expressing those reservations to the Board if the Board had been called upon, in their presence, to approve the sending of an announcement to the ASX in the form of the Draft ASX Announcement. Alternatively, it is highly unlikely that they would not have at least flagged the need for a careful review prior to any formal approval. If Mr Robb and/or Mr Cameron advised against the issue of an announcement in the terms of the Draft ASX Announcement, or advised of the need for further careful review of the document, and did so at the time of the board meeting, it is highly unlikely and implausible that the board would have nonetheless resolved that that form of announcement be approved and sent to the ASX – and it is even more unlikely, if this had occurred, that no-one who was present would have any recollection of the Draft ASX Announcement being before the meeting or being discussed.

74. Those matters might suggest that the amendments made on the two Allens copies were made after the board meeting, but on that scenario, such a course would also be inconsistent with there having earlier been a formal and unqualified resolution, in the presence of Mr Robb and Mr Cameron, that an announcement be made to the ASX *in the form of* the Draft ASX Announcement (and this still would not explain why Mr Robb and Mr Cameron stayed silent when that resolution was passed in their presence, given their concerns and what can be safely assumed to be their awareness of the many qualified statements about sufficiency of funding contained in the communication strategy, board papers and slides).

75. These are matters about which Mr Robb could have been expected to give evidence, and which would have been directly relevant to the inferences ASIC was seeking to be drawn, and the finding regarding the announcement resolution it was seeking be made. ASIC's failure to call Mr Robb in those circumstances, which correspondingly

impaired the respondent's ability to defend himself by cross-examining Mr Robb, meant that ASIC failed to meet its obligation of fairness, described below.

Procedural History

76. ASIC deals with the background to its decision not to call Mr Robb very briefly in paragraph [60] of its written submissions. The full details of the circumstances relating to that decision are set out in paragraphs [649]-[672] of the Court of Appeal's decision: ABWhi/122.25-125.50. That background demonstrates, as the Court of Appeal found, that the decision not to call Mr Robb was "a conscious decision not to call an important material witness who was available to ASIC": CA[673], ABWhi/126.1.

77. Several points should be noted. *First*, the timing is critical. ASIC received a partial draft of Mr Robb's statement on 7 October 2008: CA[656], ABWhi/123.22-25. There is no suggestion in the evidence that ASIC had previously been informed of what Mr Robb's evidence regarding the board meeting or the Draft ASX Announcement was likely to be. On the very next day, ASIC indicated for the first time that it was reconsidering whether to call the Allens witnesses: CA[657], ABWhi.27-43. In response, counsel for the respondent indicated that Mr Robb should properly be called in ASIC's case in chief, as a person who could be expected to give first-hand evidence of what occurred at the board meeting: CA[658], ABWhi/123.50-124.03. Nonetheless, on the following day ASIC announced that it would not be calling Mr Robb: CA[661], ABWhi/124.20-30. This was a decision taken in the third week of the hearing, when every indication up to that point of time was that Mr Robb would be called as a witness in ASIC's case.

78. *Secondly*, ASIC's contention (AS, [61]) that it had only a limited possibility of being able to test Mr Robb's evidence is incorrect. Mr Robb's solicitors indicated that he was available to meet with them on the day after his statement was served, "or on the weekend": CA[656], ABWhi/123.25. That is, Mr Robb was available to meet with ASIC, so that ASIC could ascertain what his evidence would be on matters not covered by the draft statement, and to test the contents of the draft statement.

79. *Thirdly*, ASIC's contention (AS, [61]) that Mr Robb was "equally available to both sides" is incorrect. Mr Robb refused to meet with the lawyers for the respondent or any of the other respondents to these appeals: CA[665]-[669], ABWhi/125.1-30. In contrast, as suggested by his offer to meet over the weekend, Mr Robb had provided

ASIC with what ASIC itself described as "exemplary co-operation": CA[653], ABWhi/123.5. In those circumstances, the Court found that Mr Robb "could not be categorised as witness who was equally available to both sides": the respondents "had no practical ability to obtain statements or otherwise assess whether they wished to call him" and it is "understandable" that "they would not take the risk of calling him blind" (CA[776], ABWhi/144/15-25).

80. *Fourthly*, ASIC does not state in its submissions its reasons for not calling Mr Robb. ASIC had below suggested, albeit (in the Court of Appeal's words) "rather faintly", that its decision not to call Mr Robb was explained and justified by a view that Mr Robb's evidence would go only to reliance by the respondents on Allens' advice, such that when it became apparent that the respondents did not positively assert they relied on his advice, there was no occasion for ASIC to call him: CA[670], ABWhi/125.30. However, when ASIC conveyed its decision not to call Mr Robb, it was aware that the respondents contested the passing of the Draft ASX Announcement resolution and maintained that Mr Robb was an important witness of fact material to that issue, and ASIC's decision not to call him was made in that knowledge: CA[671], ABWhi/125.35; see also at CA [658]. Significantly, ASIC did not suggest below, and does not now suggest, that there was any reason to believe that Mr Robb's evidence would be other than his best recollection of the relevant events. Certainly, in circumstances where a potential witness is an officer of the Court, the Court should proceed (in the absence of anything being submitted and established to the contrary) on the basis that such person would answer questions honestly and to the best of his ability to do so.

81. *Fifthly*, ASIC's claim that if Mr Robb had been called by one of the respondents, then the other respondents having like interests to the respondent calling him would have been able to cross-examine him is contrary to the way in which, on ASICs application, the hearing proceeded. When Mr Brown, who was the first of the non-executive directors to go into evidence, opened his case, the trial judge ruled, on the application of ASIC, that any of the other non-executive directors who wished to ask questions of Mr Brown could only do so by leading evidence from him in chief, prior to any cross-examination by ASIC: Day 25, T1803:22-1806:30. The trial judge subsequently rejected applications by Mr O'Brien and Mr Terry to cross-examine Mr Brown on matters arising from his cross-examination by ASIC: Day 29, T2308:45-2311:1. The examination of subsequent witnesses called in the cases of the respondents proceeded on the same basis: Day 30, T2326:25-36 (Mr Gillfillan);

Day 34, T2764:39-47 (Ms Hellicar); Day 39, T2301:13.22 (Mr Koffel); Day 41, T3484:5-11 and T3485:30-38 (Mr Willcox).

82. Consequently, there was a significant disparity between the position of ASIC and the respondent in relation to Mr Robb. ASIC had exemplary co-operation from Mr Robb, was able to meet with Mr Robb at any time that suited ASIC's counsel to ask questions of him, to test the contents of his draft statement, and to determine the evidence he would give on matters not covered by that document, and would be able to cross-examine Mr Robb with the benefit of such information if he were called "blind" by any of the respondents. In contrast, the respondent was met with a blanket refusal from Mr Robb to meet and discuss the evidence he would give, had only received a partial draft and unsigned statement, and would likely be restricted to non-leading questions in the event that Mr Robb was called by the respondent or any other non-executive director defendant.

The obligation to act fairly

83. ASIC accepts that it is subject to an obligation to act fairly in conducting proceedings. Consequently, the real point of debate is the content of that obligation, and the consequences of any failure by ASIC to discharge that obligation.

84. As regards the content of the obligation, ASIC appears to equate the content of the obligation to act fairly with the content of the model litigant obligation found in paragraph 4.2 of the Legal Services Directions (AS, [51]-[53]). However, there are at least three fundamental problems with such an approach. *First*, the obligation of the Crown to act fairly in conducting proceedings against individuals was recognized well before the Legal Services Directions were first issued in 1999. Almost one hundred years ago, Griffith CJ referred to the "traditional, and almost instinctive standard of fair play to be observed by the Crown in dealing with subjects": *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342. Indeed, the Chief Justice described it as a standard "which I learned a very long time ago to regard as elementary". *Secondly*, it cannot be the case that the question whether the executive has behaved fairly in its conduct of proceedings is to be determined solely by reference to a set of directions issued by the executive. The Legal Services Directions cannot be the sole arbiter of what is fair. *Thirdly*, the Legal Services Directions themselves do not purport to provide an exhaustive statement of the Commonwealth's obligation to act fairly. Appendix B to those Directions, which sets out the model litigant standard states as follows:

> In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and its agencies will act as a model litigant has been recognised by the Courts. See, for example, *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

That is, the Directions define the obligation of fairness in broad terms, by reference to the authorities cited. There is therefore no basis to find that the scope of the obligation recognised by those authorities should be restricted by reference to the scope of the Directions.

85. As the Full Court of the Federal Court observed in *Scott v Handley* (1999) 58 ALD 373 at [45] (per Spender, Finn and Weinberg JJ), the "burden of this fair dealing standard is best appreciated in its particular exemplifications in individual cases." Particular elements of the fair dealing standard, to which the members of the Full Court referred, are as follows:

> The courts have, for example, *spoken positively* of a public body's obligation ... of assisting 'the court to arrive at the proper and just result': *P & C Cantarella Pty Ltd v Egg Marketing Board* [1973] 2 NSWLR 366 at 383-384 per Mahoney J. And they have *spoken negatively* ... of not unfairly impairing the other party's capacity to defend itself: *Director of Public Prosecutions (Cth) v Saxon* (1992) 28 NSWLR 263 at 268 [emphasis added].

86. ASIC has cited the decisions in *Scott* and *Cantarella* in its written submissions, apparently as articulating the scope of the obligation to which ASIC acknowledges it is subject (see AS, fn [35]).

87. In *Mahenthirarasa v State Rail Authority of NSW (No 2)* (2008) 72 NSWLR 273, the NSW Court of Appeal referred to the statement in *Cantarella* that it is the executive's duty to assist the court to arrive at the proper and just result, and noted that this principle was not novel and was to be derived from long-standing authority applied to the Crown in the United Kingdom (at [16]-[17] per Basten JA, with whom Giles and Bell JJA agreed).

88. In *Leerdam v Noori* (2009) 25 ALR 553 at [62]-[63], Allsop P again referred approvingly to the principle in *Cantarella*. His Honour described a suggestion that the minister owed a duty to afford procedural fairness to the applicant in a review of his decision by the AAT as "highly debatable", but continued:

> That is not to say, however, that inhering in the executive power in conducting him or herself in a review in the tribunal a minister would not have duties of the character discussed by Mahoney J (as he then was) in *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383-4. The duty of the executive to assist a court "to arrive at the proper and just result", might be seen to be mirrored by a duty to assist another agent of the executive with statutory powers of review to reach the proper and just result. This may be seen as part of the duty of every minister of the Crown to the Sovereign to perform his or her functions honestly and fairly and to the best of his or her ability: Lord Greene MR in *B Johnson & Co (Builders) Ltd v Minister of Health* (1949) 177 LT 455 at 459 cited by Williams J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 221–2 ; [1951] ALR 129 at 189–90.

89. The statement of principle in *Cantarella* has also been referred to with approval by his Honour Justice Allsop, sitting at first instance and on appeal in the Federal Court, in a number of other cases such as *Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325 at [6] (Stone and Edmonds JJ agreeing); *SZBPM v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 215 at [31]; and *Kamha v Australian Prudential Regulation Authority* [2005] FCA 173 at [10]. In *Kamha*, Allsop J observed (at [10]) that "what fell from Mahoney J [in *Cantarella*] and what was said in the cases to which his Honour referred is not limited to circumstances where the Crown might be criticised for taking an unfair position; it is a matter which informs their conduct and informs, more importantly, for today's purposes, in my view, the conduct of the Court in how it deals with the matter of a citizen in litigation with the Crown".

90. In the Supreme Court of Victoria, the obligation of a government agency to assist the Court to arrive at the proper and just result has been specifically linked to the need for the Court to be satisfied that the burden upon the government agency in the litigation has been adequately discharged. In *Dr Claire Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Incorporated* [2011] VSC 153, Pagone J (at [12]) referred to the obligation of a government official to act as a model litigant and observed that:

> The overriding duty for the Court must be to achieve justice between the parties and to ensure that it is satisfied that the burden which a *party bears is adequately and reliably discharged.* A government official exercising a statutory function or duty shares a common interest with the Court in *co-operating to achieve the correct result.* [emphasis added]

91. Pagone J has made similar observations in *Law Institute of Victoria Ltd v Deputy Commissioner of Taxation* [2009] VSC 55 at [19], referring to the Commissioner as "proponent" of the public interest having "an important role to play to assist the Court in reaching the correct answer".

92. The obligation of a public body in conducting litigation to assist the Court to arrive at the proper and just result, emphasised by the Full Court of the Federal Court in *Scott* and by the Court of Appeal in *Mahenthirarasa* and *Leerdam*, has been specifically applied to ASIC.

93. For example, in *ASIC v Citigroup Global Markets Australia Pty Ltd (No 3)* [2007] FCA 393, Jacobson J held (at [13]) that, since ASIC's duty as a litigant is analogous to that of the Executive, ASIC would not, in its conduct of the case, "be influenced by tactical or forensic considerations", because ASIC's duty (citing *Cantarella*) is to "assist the Court to arrive at the proper and just result".

94. Similarly, in *ASIC v Rich* (2009) 75 ACSR 1 at [523]-[524], Austin J cited *Scott v Handley* as authority for the proposition that the Commonwealth, its officers and agencies were expected to adhere to standards of fair dealing, and specifically had duties to assist the court to arrive at a proper and just result, and not unfairly to impair the capacity of the other party to defend itself. His Honour held that this applied to ASIC as an agency of the Commonwealth, stating that the "Commonwealth and its agencies, including ASIC, are held to a standard of fair dealing which is higher than the standard applicable to other litigants". In particular, his Honour held (at [530]) that "ASIC has a special duty as a Commonwealth agency, in civil proceedings, to act in a manner so as to facilitate a fair trial".

95. The Victorian Court of Appeal expressed a similar view in *ASIC v Lindberg (No 2)* (2010) 26 VR 355 at 367, [51]:

> It is clearly in the public interest, and wholly consistent with ASIC's statutory obligations, that decisions about the institution of civil penalty proceedings be made with care. Although ASIC is not subject to a duty of fairness akin to prosecutorial fairness as such [citing *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504 at 646-7], it is obliged to discharge the duty of fairness of all Commonwealth agencies in civil proceedings, and to act in that regard as a "model litigant" [citing *Scott v Handley*, and *ASIC v Rich*]. It must not be forgotten that ASIC is acting, in some respects, in a role analogous to that of a prosecutor when it commences a civil penalty proceeding [citing *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at 259, [1] per Santow J.].

96. In the same passage, the Court noted (fn 33) that in *ASIC v Loiterton* [2004] NSWSC 172 at [370], ASIC had itself accepted that it had an obligation of "prosecutorial fairness" in the conduct of civil penalty proceedings. Although that precise concession must now be regarded as having been incorrectly made, it does indicate ASIC's understanding that it is subject to an obligation of fairness (as it has conceded in this case) in pursuing civil penalty proceedings. Significantly, in making the concession in *Loiterton*, ASIC submitted that the content of the obligation to which it acknowledged itself to be subject was "uncertain" (at [370]). Yet ASIC now relies on the uncertain scope of such an obligation as a basis for submitting that the Court of Appeal was wrong in its articulation and application of that obligation (this submission is further addressed below).

97. In *ASIC v Mining Projects Group* (2007) 164 FCR 32 at [35], Finkelstein J wrote sarcastically of the suggestion that there is some justification for ASIC not being subject to a duty in civil penalty proceedings to assist the Court to arrive at the proper and just result:

> A lay person might be forgiven for thinking that in the present context the distinction between civil and criminal proceedings is somewhat artificial and that in both kinds of proceedings the regulatory authority or prosecutor (as the case may be) is under a duty to ensure that the decider of facts (judge or jury) is best placed to arrive at the proper and just result. Perhaps the reason courts have rejected this approach is that in a criminal proceeding a conviction may result in imprisonment whereas in a civil penalty proceeding the worst that can happen is that the defendant's career is ruined or his life is wrecked.

98. His Honour was, with respect, incorrect to state that the Courts have rejected the suggestion that ASIC in civil penalty proceedings is under a "duty to ensure that the decider of facts (judge or jury) is best placed to arrive at the proper and just result". As outlined above, that has been regarded as part of the fair dealing standard to which ASIC is subject in bringing such proceedings. What has been rejected (including by the Court of Appeal below: CA[678]-[700], ABWhi/126.20-130.5) has been the application of specific prosecutorial duties in a civil penalty proceeding. However, that does not entail the rejection of what might be called a "middle ground", namely the well-established proposition that ASIC owes an obligation of fairness, of the type articulated in *Scott v Handley*, in pursuing such proceedings.

99. Significantly, although ASIC questions the suggestion that there can be a "middle ground", it is worth noting the precise terms of the concessions made by ASIC's counsel before the Court of Appeal. In ASIC's reply submissions on the special

leave application, it stated that "the 'concession' made by ASIC in the Court of Appeal was only 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*' – T447:18-27". This submission does not take account of a later passage of the transcript, where ASIC's counsel expressly accepted before the Court of Appeal that it had a duty that was higher than and different from that of other litigants (Day 7, T498:39- 499:18):

> "*SPIGELMAN CJ: May I ask you this: the powers that your client has are to be exercised in the public interest.*
>
> *MR BANNON: Yes.*
>
> *SPIGELMAN CJ: That must put it outside the category of a normal civil litigant who acts only in his or her or its private interest.*
>
> *MR BANNON: Certainly. There is no doubt about that, your Honour.*
>
> *SPIGELMAN CJ: All litigants should be model litigants.*
>
> *MR BANNON: Yes, quite.*
>
> *SPIGELMAN CJ: But your client has additional responsibilities.*
>
> *MR BANNON: Quite.*
>
> *SPIGELMAN CJ: They may or may not reach as high as what the courts have determined prosecutors owe, but they go beyond what a civil litigant has to do and how a normal litigant is entitled to behave.*
>
> *MR BANNON: We don't dispute any of that. ...*"

100. Consistently with those concessions, although the Court of Appeal found that ASIC did not owe any prosecutorial duty when conducting civil penalty proceedings, it is subject to an obligation of fairness that goes beyond that the usual obligations of a private litigant. Further, the Court said that the same standard of fair dealing which the Commonwealth and its agencies must observe in civil proceedings lies behind the prosecutorial duty, referring to the observation in *Whitehorn v R* (1983) 152 CLR 657 at 663-664 that the Crown Prosecutor, who represents the state, must "act with fairness and detachment and *always with the objectives of establishing the whole*

truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one" (emphasis added): CA[707], ABWhi/131.20-25.

101. The notion that there is some similarity between the role of a prosecutor and the role of ASIC in a civil penalty proceeding is consistent with observations made in the appellate decisions in *ASIC v Rich*. For example, in dissent in the Court of Appeal, McColl JA made the following observations ((2003) 48 ACSR 6 at [379]):

> Although structured as a civil case both in terms of the procedures to be applied (s 1317L) and the onus of proof (s 1332), the proceedings are, in effect brought by the state and 'accuse' the defendant of a contravention of a public law — just as, in the criminal context the defendant is accused of a breach of a statute. The civil penalty scheme pivots around the declaration of contravention which operates in the same sense as a finding of guilt and leads, in turn, to the imposition of one or other of the available civil penalty orders. It is not a suit which is purely of a civil nature.

In the subsequent appeal, the joint judgment of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ referred (220 CLR 129 at 145, [32]), to the "difficulties" that beset attempts to classify all proceedings as either civil or criminal, citing *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161.

102. The remarks by Hayne J in the *Labrador Liquor* case (with whom Gleeson CJ and McHugh J agreed) have particular significance for ASIC's contention that the terms of s1317L, with its prescription of civil procedure and rules of evidence, mean that ASIC need not call any particular witness in order to meet the fair dealing standard, and further mean that a failure to do so cannot have any implications for the assessment whether it has discharged its burden of proof. In the *Labrador Liquor* case, Hayne J observed (at [114]) that arguments founded on classification of the proceedings as ''civil'' or ''criminal'' as determinative of the standard of proof must fail, noting that any such classification is, at best, unstable as "it seeks to divide the litigious world into only two parts when, in truth, that world is more complex and varied than such a classification acknowledges". (See also Gummow J at [29]; and Kirby J at [52], [64] and [66]-[67].) Hayne J specifically referred to proceedings for civil penalties under corporations legislation as being "proceedings with both civil and criminal characteristics" (at [114]).

103. Hayne J identified the problem with a chain of reasoning, moving from an *a priori* classification to a conclusion about the standard of proof, as "treating the relevant Acts as providing no more than background information when, in truth, it is with the terms of the Acts that the inquiry must begin" (at [115]). In the present case, the Court of Appeal did commence its inquiry regarding the obligations of ASIC in bringing and prosecuting civil penalty proceedings with a detailed examination of the relevant statutory provisions: CA[718]-[727], ABWhi/133.5-136.15. There is no submission by ASIC that there was any error by the Court in that analysis. The Court concluded as a result of that analysis that the cumulative effect of the provisions was that ASIC cannot be regarded as an ordinary civil litigant when it institutes proceedings, and particularly civil penalty proceedings; that it is subject to the fair dealing standard; and that there can be circumstances where a failure to call a witness means that ASIC has failed to meet that standard: CA[728], ABWhi/136.17-22.

104. So, ASIC's assertion (AS, [55]) that no Australian cases concerning the obligation of fairness "have anything to say about matters of proof" is not correct. There is a line of authority, which has received approval at appellate level in the Supreme Courts of NSW and Victoria and in the Federal Court, to the effect that the fair dealing standard articulated by Griffith CJ, to which ASIC acknowledges it is subject, imposes an obligation upon ASIC to assist the Court to arrive at the proper and just result, not to be influenced by tactical or forensic considerations at the expense of that aim, to act in a manner so as to facilitate a fair trial, and not unfairly to impair the other party's capacity to defend itself.

105. Likewise, ASIC is incorrect to contend that the Legal Services Directions 2005 have nothing to say about matters of proof. The model litigant standard set out in Appendix B to those Directions includes various matters aimed at ensuring the Court arrives at a proper and just result, not being influenced by tactical or forensic considerations at the expense of that aim, and not unfairly impairing the other party's capacity to defend itself, such as:

(a) not requiring the other party to prove a matter which the Commonwealth or agency knows to be true;

(b) not contesting liability if the Commonwealth or agency knows that the dispute is really about quantum;

(c) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim; and

(d) not relying on technical defences unless the Commonwealth's or the agency's interests would be prejudiced by the failure to comply with a particular requirement.

(Legal Services Directions 2005, Appendix B, paragraphs 2(e)(i)-(ii) and 2(f)-(g).)

106. There is therefore, contrary to ASIC's submissions, nothing novel or extraordinary in the conclusion that the fair dealing standard to which ASIC, as a public body, is subject when conducting civil penalty proceedings against an individual obliges it to assist the Court to ensure that the case presented by that body does in fact represent the truth, and not to take any step that impairs a defendant's capacity to defend him or herself.

107. ASIC's contention otherwise would appear to involve the startling proposition that its obligation to assist the Court to arrive at a "the proper and just result" articulated in *Scott v Handley* (which ASIC has cited as indicating the scope of the duty it owes) does not involve any obligation to ensure the case which it is presenting does in fact represent the truth.

108. Further, there are strong policy considerations why the fair dealing standard to which ASIC acknowledges it is subject should comprehend an obligation to ensure, in the context of a civil penalty proceeding, that the case which it is presenting does in fact represent the truth, and that the defendant is not impaired in his or her capacity to defend him or herself. ASIC is the only person who can bring a civil penalty proceeding: *Corporations Act 2001 (Cth)*, subs 1317J(1). As Austin J observed in *ASIC v Rich* (2009) 75 ACSR 1 at 134-135, [533]:

> Successful prosecution of civil penalty proceedings leads to a determination of contravention of a public law, and may lead to a declaration of contravention which itself involves public opprobrium and condemnation, and the imposition of a penalty by way of pecuniary penalty or disqualification order. ASIC as plaintiff is acting as an agency of the Commonwealth and not as a private litigant, and like the prosecutor in criminal proceedings, is the guardian of the public interest with a responsibility to ensure that justice is done.

109. When bringing civil penalty proceedings, ASIC has no legitimate private interest of the kind which often arises in civil litigation, but instead acts, and acts only, in the public interest as identified in the regulatory regime: CA[716], ABWhi/132.45.

110. There can be no policy justification for ASIC pursuing civil penalties based on a case which might be established on the basis of selective or incomplete evidence that ASIC chooses to lead, but does not in fact represent what occurred. Nor can there be any policy justification for the regulator adopting a stance based on forensic or tactical considerations that, on the facts of the particular case, impairs a person's capacity to defend him or herself. Indeed, the adoption of such a stance would be contrary to the public interest because it may result in a civil penalty action succeeding where it may otherwise not have done so, and in the banning of a director who should not have been banned. It is not in the public interest for a person's career, reputation and possibly livelihood to be damaged or destroyed by a set of findings which might be open on the evidence before the Court but which do not in fact represent what occurred, because the material available evidence is incomplete. If the latter situation arose because of tactical or forensic decisions taken by ASIC not to lead evidence from a person or persons who were central to contested factual issues, it could not be said that ASIC had complied with the fair dealing standard, and in particular had discharged its responsibility to assist the Court to arrive at the proper and just result. Such a result could in no way be described as either proper or just.

Failure to meet the fair dealing standard

111. Mr Robb could be expected to have been able to give evidence regarding the drafting of the minutes; the circumstances in which he was provided with copies of the Draft ASX Announcement; the significance of his handwritten amendments and whether they reflect any advice given to the company (and if so, what advice and when); the discussion between himself, Mr Cameron, Mr Macdonald and Mr Shafron on the morning of the February board meeting, and Allens' reaction to the information regarding the actuarial estimates provided to them at that meeting; the February board meeting and in particular the nature and content of any discussion regarding communications at that meeting; the resolutions passed at the February meeting; any steps taken after the meeting, in which Allens were involved, relating to the draft announcement; and any steps taken by Mr Robb or Mr Cameron in relation to the minutes after the February meeting.

112. That is, Mr Robb could be expected to have been able to give evidence about each of the inferences which ASIC submits should be drawn in relation to his conduct, in support of their claim against the respondent. Even if Mr Robb had little recollection of events (and there is no evidence to that effect before the Court), ASIC ought to have called him to establish that this was so, and to allow him to be cross-examined: CA[775], ABWhi/144.10-15. In any case, there was every reason to believe that matters of primary fact relating to the issues outlined in the preceding paragraph would have been of sufficient concern for Mr Robb to have given attention to the events of the February board meeting: CA[761], ABWhi/141.45-142.8.

113. ASIC's failure to call Mr Robb, in circumstances where ASIC was asking the Court to make these inferences in a civil penalty case, with the serious consequences that might flow for the respondents, where ASIC had received exemplary co-operation from Mr Robb and knew that, in contrast, he would not meet and talk with any of the respondents, meant that ASIC failed to discharge the fair dealing standard in its conduct of the case.

114. Contrary to ASIC's submissions, a determination that it failed to meet the fair dealing standard, by not calling Mr Robb in the circumstances of this case, does not undermine the statutory requirement that the Court must apply the rules of evidence and procedure for civil matters when hearing civil penalty proceedings (*Corporations Act 2001 (Cth)*, s1317L), nor does it undermine the "adversary system" said to be "built into" those rules and procedure (see AS, [58]).

115. *First*, the fair dealing standard, including the obligation to assist the Court to arrive at a proper and just result, applies to the Commonwealth and its agencies in commencing and conducting civil proceedings, and therefore cannot be regarded as being foreign to a proceeding conducted in accordance with s1317L.

116. *Secondly*, even if this were regarded as working some modification to the adversarial system, such an approach is appropriate to ensure that ASIC, in bringing civil penalty proceedings, takes steps to ensure that the Court arrives at the proper and just result, and justice is thereby done. There are various ways in which a party's power to call witnesses may be restricted in the interests of justice, such as a restriction on calling witnesses unless statements or outlines have been served, or such as requiring parties to brief a joint expert witness, or such as limiting the number of experts in any one field who may be called. All such matters, which occur regularly in civil

proceedings, involve restrictions on the ability of a party to determine which witnesses it may call in its case.

117. *Thirdly,* there is in any case no harm done to the adversary system. It remains solely a matter for ASIC, advised by its legal representatives, to determine which witnesses should be called in its case. The Court and the other parties do not have any power to compel any witnesses to be called. As is the case with the prosecutorial duty, the Court will not intervene with the decision as to which witnesses will be called: CA[715], ABWhi/132.35. However, as addressed further below, a tactical decision not to call a particular witness, whose evidence would likely have been critical to a key factual issue in the case, may affect the Court's determination of the weight to be given to the evidence that was led in relation to that issue.

Consequences of failure to act fairly in conduct of the proceeding

118. As outlined by the Hellicar Respondents in their submissions, it has long been recognised – as part of civil rules of evidence and procedure – that a failure by a party to call evidence which was available to it may affect the assessment of the weight of the evidence which was led by that party (the rule in *Blatch v Archer)*; and the rule in *Jones v Dunkel* is one aspect of this principle.

119. The cases which have approved the rule in *Blatch v Archer* frequently speak in terms of a "failure" by a party to call a certain witness. For example, in *Payne v Parker* [1976] 1 NSWLR 191 at 200-201 Glass JA said that the reasoning permissible under the rule involves the treatment of "a failure to adduce evidence" as a reason for increasing the weight of the proofs of the opposite party or reducing the weight of the proofs of the party in default; and said that instances where the principle may operate include a "failure to call a particular witness", a "failure to adduce any evidence at all", and a "failure to produce a particular document". Similarly, in *Shalhoub v Buchanan* [2004] NSWSC 99 at [71], Campbell J said that "*failure* of a party who bears an onus of proof to call an available witness who could cast light on some matter in dispute can be taken into account in deciding whether that onus is discharged, in circumstances where such evidence as has been called does not itself clearly discharge the onus" (emphasis added).

120. The use of this language does not mean that the party who "failed" to call a witness was under an enforceable duty to call such a witness, or that the case has moved beyond the adversary system by taking out of the hands of an individual party the

decision as to which witnesses it calls in its own case. It merely means that the party was expected to, but did not, call that witness. The decision as to which witnesses to call remains the decision of the individual party – but the rule in *Blatch v Archer* recognizes that such a decision may have consequences for the weight given to the evidence that is in fact led.

121. Significantly, Gleeson CJ has described the rule in *Blatch v Archer* as "a fundamental precept of the adversarial system of justice" (*Russo v Aiello* (2003) 215 CLR 643 at [11]); and as a "basic principle of adversarial litigation" (*Swain v Waverley Municipal Council* (2005) 220 CLR 517 at [17]). It is, with respect, correctly described in this way because the failure to call a witness has a consequence precisely because it is within the party's power to determine whom to call. If it were not up to a party, but to the Court to determine which witnesses gave evidence in a proceeding, the rule in *Blatch v Archer* could not arise.

122. The rule was given particular application to a failure by ASIC to call a key witness in a civil penalty proceeding in *Whitlam v ASIC* (2003) 57 NSWLR 559 at [119], where the Court of Appeal referred to "the *requirement* that a party seeking a finding of serious misconduct produce adequate material to enable a court to reach a comfortable satisfaction on such a serious matter", and the "*need* to be diligent in calling available evidence" (emphasis added).

123. Again, the language of "needing" or "being required" to call available evidence does not mean that the party is obliged to call a witness, in the sense that the decision whether or not to do so is taken out of its hands. Instead, the language reflects the expectation on the part of the Court that a Commonwealth agency seeking to make out a claim which will have serious consequences for an individual will take steps to ensure that the proper and just result is reached by adducing available evidence in relation to the main issues in the case, such that a "failure" to do so will affect the weight given to the evidence that it chooses to lead.

124. As has already been addressed above, the Court of Appeal's decision below was one which took into account the rule in *Blatch v Archer*, and held that the rule should apply "the more so" where the party who has failed to call a particular witness was a party subject to the standard of fair dealing, including the obligation to assist the Court to arrive at the proper and just result in the proceeding, and not to impair a defendant in his or her defence. Their Honours reasoning can be summarised as follows: (a) in light of the evidence on which ASIC relied to discharge its onus, Mr

Robb became "a witness of central significance to critical issues that had arisen in the proceedings" (CA[775], ABWhi/144.5-10); (b) in all the circumstances, including the fact that Mr Robb was not "equally available to both sides" (CA[776], ABWhi/144.1-25), and having regard to ASIC's obligation of fairness, "ASIC would be expected to call Mr Robb" (CA[766], ABWhi/142.43); and (c) ASIC's failure to do so "tells against [the Court's] achieving the 'comfortable satisfaction' of which Rich J spoke (at CLR 350), and the 'reasonable satisfaction' of the truth of the allegation of which Dixon J spoke (at CLR 368-9), in *Briginshaw*" (CA[795], ABWhi/147.35-40). Not only was there no error in that reasoning, it accords with commonsense.

Criticisms by ASIC

125. The other main criticisms by ASIC of the Court of Appeal's description and application of the obligation of fairness are that (a) the obligation is of "uncertain scope"; (b) the obligation appears to rise higher than the duty of prosecutorial fairness (which the Court of Appeal held did not apply); and (c) ASIC was not given the opportunity to explain why it chose not to call Mr Robb.

126. As regards the first of these, saying that an obligation to act fairly is of uncertain scope is similar to saying that a director's obligation under section 180 of the *Corporations Act* to act with care and diligence is of uncertain scope. In each case, the principle is broadly expressed, and cannot be reduced to a detailed code of conduct which can be applied as a template to all occasions. ASIC recognised and continues to recognise that it is subject to an obligation of fairness, which it traces to Griffith CJ's reference to the "standard of fair play", and which it sees as embodied in the Legal Services Directions that refer to an obligation to "act with complete propriety, fairly and in accordance with the highest professional standards". These are necessarily broad notions, the application of which will depend on the circumstances of the individual case.

127. As the Court of Appeal acknowledged, what is required by fairness is "not capable of reduction to a fixed body of rules"; "What a fair trial requires will depend on the particular status and capacity of the governmental agency invoking the procedures of the court and the scope, purpose and object of the legislative regime which it is seeking to enforce in the public interest. It must also depend upon the particular circumstances of the case." (CA[714], ABWhi/132.23-30) (Similarly, in the context of the prosecutorial duty, the assessment of the decision not to call a particular

witness must be taken in the overall context of the conduct of the whole of the trial: CA[715], ABWhi/132.36-39, citing *R v Apostilides* (1984) 154 CLR 563 at 575-576.) The circumstances to be taken into account will include the extent to which the witness is likely to have been able to give evidence relevant to important factual disputes in the case, the nature of the evidence that was led in relation to those factual issues, and the extent to which the government agency seeks, in support of its version of events, inferences to be drawn about what that witness thought, said or did (or did not do). As discussed above, a consideration of such matters supports the conclusion that ASIC ought, in the circumstances of this case, have called Mr Robb as a witness in order to meet its obligations to conduct the proceedings in accordance with the fair dealing standard.

128. As regards the second of the criticisms outlined above, the Court of Appeal recognised that the obligation to act fairly cannot rise higher than a prosecutor's duty to call material witnesses: CA[715], ABWhi/132.33.

129. Nonetheless, ASIC contends that the Court of Appeal's articulation of the obligation of fairness is more stringent than the prosecutorial duty, in that, even if the prosecutorial duty had applied, there would have been no miscarriage of justice in circumstances where Mr Robb was made available by ASIC to be called by the respondents, the respondent calling him would have been able to make any application under section 38 of the *Evidence Act*, and at least some of the respondents having like interests to the respondent calling him would have been able to cross-examine him (AS, [63]).

130. There are two main responses to this contention.

131. *First*, ASIC's submission proceeds on the basis that Mr Robb was "made available" by ASIC, and that, if he had been called by one respondent, others in a like interest would have been able to cross-examine him. These matters have already been addressed above. In brief, whereas Mr Robb was providing ASIC with "exemplary co-operation" and was willing to meet ASIC's counsel on the weekend, he refused to engage at all with the respondent's representatives, and rulings by the trial judge regarding the order of and restrictions on the examination of witnesses called by the respondents made it very unlikely that Mr Robb would have been available for cross-examination by all of the other respondents if one chose to call him (see paragraph [81] above). As for the suggestion that a respondent who called Mr Robb would have been able to make an application under s38 to ask leading questions of him,

such an application may only be made in respect of questions regarding the specific matters set out in paragraphs 38(1)(a)-(c), and depends upon leave being granted: it is significant that in the *Apostilides* case the accused adopted the course of calling witnesses whom the Crown had announced it would not call, and was refused an application for cross-examination (see 154 CLR 563 at 568).

132. *Secondly*, it follows that ASIC's contention that, if the prosecutorial duty had applied, there could have been no miscarriage of justice by reason of the opportunities of the respondent to cross-examine Mr Robb either if he was called by another respondent, or by means of a s38 application, is without substance. In *R v Su* [1997] 1 VR 1, the Victorian Court of Appeal held that the ability of one accused to cross-examine a witness called by the other was a critical factor in determining whether there had been a miscarriage of justice (at 37). The Court commented (at 36): "Of course, were there but one accused, the bare fact that that accused is denied the opportunity of cross-examining the witness may itself be a significant factor in determining whether there has been some miscarriage of justice". The same reasoning would apply where there was more than one respondent in the same interest, but such respondents were not permitted to cross-examine any witness called by any other such respondent.

133. The decisions in *Whitehorn* and *Apostilides* indicate that, where a witness is a material witness so as to come within the prosecutorial obligation, the prosecutor is obliged either to call the witness (even if he or she does not wish to lead evidence), so that the witness can be cross-examined by the accused, or to provide satisfactory reasons as to why the prosecutor has concluded that the witness's evidence was so unreliable as to justify their not being called (or possibly do both). Here, ASIC did neither. In concluding in *Whitehorn* that there had been a miscarriage of justice, Deane J gave particular weight (at 666) to the fact that the accused's solicitors were unlikely to be allowed to question the relevant child witness, whose evidence was of critical importance, which meant that the accused was not in a position to find out what evidence the child would give if called as a witness. Similarly, although the respondent was provided with a partial, draft, unsigned statement of Mr Robb, the respondent was precluded (unlike ASIC) from asking any questions of Mr Robb regarding the evidence he might give, and therefore was not able to test the extent to which the content of the partial unsigned draft represented the evidence he would give if called, or the evidence he would give on matters beyond the content of the partial unsigned statement.

134. At paragraph [66] of its written submissions, ASIC contends that the observations of Dawson J in *Whitehorn* at 682 are apposite, namely that: "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". However, it is difficult to see why this statement is said to assist ASIC, for two reasons. First, Dawson J's statement was made in the context of his Honour's analysis of whether a judge had power to call a witness. Secondly, and in any event, it is common ground that the trial was an adversarial one, conducted according to civil procedure and rules of evidence – just as it appears to be common ground that a basic principle of the adversarial system and of civil rules of evidence is the principle in *Blatch v Archer*, and just as it appears to be common ground that ASIC, in bringing civil penalty proceedings, is subject to an obligation of fairness, or fair dealing standard. In particular, it cannot be suggested that the Court of Appeal took any course that involved its "taking part" in the disputations between ASIC and the respondent. Instead, the Court determined those disputations, and in particular the dispute regarding the critical factual issue as to whether the announcement resolution was passed, by weighing the evidence having regard to the principle in *Blatch v Archer*, which was seen as receiving added force by reason that the failure to call Mr Robb was regarded as conduct inconsistent with the fair dealing standard. Although it is certainly the case that a trial does not involve the pursuit of truth "by any means", it does nevertheless involve the pursuit of truth; and, in making factual findings, the Court properly, and in accordance with long-standing principle, assessed the weight of the evidence having regard to the fact that (a) ASIC chose not to call a witness who was available to ASIC and was central to the key factual issue in the proceeding, and (b) by reason of its obligation to assist the Court to arrive at the proper and just result, ASIC ought to have called Mr Robb.

135. Just as a trial does not involve the pursuit of truth by any means, so a civil penalty hearing should not involve the pursuit of penalty orders by any means. Such orders should only be imposed where ASIC has persuaded the Court, having regard to s140 and *Briginshaw v Briginshaw*, that the evidence which it has led (the weight of which should be assessed having regard to any other evidence which ASIC would have been expected to, but did not, lead), of the truth of the factual assertions that are fundamental to its claim. In the present case, the Court of Appeal found that ASIC had not discharged that burden, particularly having regard to the failure to call Mr Robb, and that conclusion followed the more so because, having regard to ASIC's obligation to assist the Court to reach the proper and just result, it ought to have

called him in its case. As Dawson J stated in *Whitehorn* (immediately after the passage quoted by ASIC and set out above, 152 CLR at 682): "When a party's case is deficient, the ordinary consequence is that it does not succeed." On a proper evaluation of the weight of the evidence, the Court of Appeal found ASIC's case was deficient in respect of the critical factual allegation regarding the Draft ASX Announcement resolution, and therefore failed.

136. Finally, as regards the third of the criticisms outlined above, the argument that ASIC was denied an opportunity to explain its decision not to call Mr Robb is without merit. At first instance and before the Court of Appeal, the respondent argued that ASIC was subject to the prosecutorial duty of fairness, and was required to provide an explanation for its decision not to call Mr Robb: see, for example, ABOr1/491F-N. Thus, the need for an explanation was squarely raised. At no stage did ASIC claim, which would have been necessary had the prosecutorial duty been found to apply, that it did not call Mr Robb because his evidence would have been unreliable or incapable of belief, or would not have assisted the Court to arrive at the proper and just result. ASIC did in fact give a reason for its decision, namely it had formed a view that Mr Robb's evidence was not part of its case in chief: ABBla1/218I-O and ABBla1/218U. As noted above, that explanation was rejected as without foundation: CA[670]-[671], ABWhi/125.30-35. Consequently, there is no basis for ASIC now to suggest that it might have been able to proffer some other (unstated and unsubstantiated) explanation for its decision not to call Mr Robb if required to do so.

Part VII: Notice of Contention

137. In respect of his notice of contention (ABGre/42-43), the respondent relies on the submissions in paragraphs [14]-[57] above, and on the submissions of the Hellicar Respondents, and of the other respondents to ASIC's appeals.

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