HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No S176/2011

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

MEREDITH HELLICAR — RESPONDENT

Matter No S177/2011

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

MICHAEL ROBERT BROWN — RESPONDENT

Matter No S178/2011

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

MICHAEL JOHN GILLFILLAN — RESPONDENT

Matter No S179/2011

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

MARTIN KOFFEL — RESPONDENT

Matter No S175/2011

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

GREGORY JAMES TERRY — RESPONDENT

Matter No S180/2011

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

GEOFFREY FREDERICK O'BRIEN — RESPONDENT

Matter No S181/2011

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

PETER JOHN WILLCOX — RESPONDENT

Matter No S174/2011

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION — APPELLANT

AND

PETER JAMES SHAFRON — RESPONDENT

Australian Securities and Investments Commission v Hellicar
Australian Securities and Investments Commission v Brown
Australian Securities and Investments Commission v Gillfillan
Australian Securities and Investments Commission v Koffel
Australian Securities and Investments Commission v Terry
Australian Securities and Investments Commission v O'Brien
Australian Securities and Investments Commission v Willcox
Australian Securities and Investments Commission v Shafron
[2012] HCA 17
3 May 2012
S176/2011 to S179/2011, S175/2011, S180/2011 to S181/2011 & S174/2011

ORDER

In matter S174/2011:

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 December 2010 in Matter No 2009/00298416, in which Peter James Shafron was appellant and Australian Securities and Investments Commission was respondent.*

3. *Remit the matter to the Court of Appeal for determination of so much of the appeal and cross-appeal in that matter as relates to penalty.*

4. *The costs of the proceedings in the Court of Appeal are to be in the discretion of that Court.*

In matters S175/2011 and S180/2011:

1. *Appeal allowed with costs.*

2. *Set aside paragraphs (a), (b), (c) and (e) of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 December 2010.*

3. *Remit the matter to the Court of Appeal for determination of:*

   (a) *so much of the appeal to that Court as relates to relief from liability and penalty; and*

   (b) *the cross-appeal to that Court in relation to costs.*

4. *The costs of the proceedings in the Court of Appeal are to be in the discretion of that Court.*

In matters S176/2011, S177/2011, S178/2011, S179/2011 and S181/2011:

1. *Appeal allowed with costs.*

2. *Set aside paragraphs (a), (b), (c) and (e) of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 December 2010.*

3. *Remit the matter to the Court of Appeal for determination of so much of the appeal to that Court as relates to relief from liability and penalty.*

4. The costs of the proceedings in the Court of Appeal are to be in the discretion of that Court.

On appeal from the Supreme Court of New South Wales

Representation

S J Gageler SC, Solicitor-General of the Commonwealth and A J L Bannon SC with R T Beech-Jones SC and S E Pritchard for the appellant (instructed by Clayton Utz Lawyers)

J T Gleeson SC with R S Hollo SC and R J Hardcastle for the respondents in S176/2011 to S179/2011 (instructed by Atanaskovic Hartnell Lawyers)

A S Bell SC with S M Nixon for the respondent in S175/2011 (instructed by Blake Dawson Lawyers)

P M Wood with M S Henry for the respondent in S180/2011 (instructed by Arnold Bloch Leibler)

T Jucovic QC with R C Scruby for the respondent in S181/2011 (instructed by Kemp Strang Lawyers)

B W Walker SC with R P L Lancaster SC and N J Owens for the respondent in S174/2011 (instructed by Middletons Lawyers)

CATCHWORDS

Australian Securities and Investments Commission v Hellicar
Australian Securities and Investments Commission v Brown
Australian Securities and Investments Commission v Gillfillan
Australian Securities and Investments Commission v Koffel
Australian Securities and Investments Commission v Terry
Australian Securities and Investments Commission v O'Brien
Australian Securities and Investments Commission v Willcox
Australian Securities and Investments Commission v Shafron

Corporations – Duties and liabilities of directors and officers – Contraventions of civil penalty provisions of *Corporations Act* 2001 (Cth) ("the Act") – Corporation released misleading announcement to Australian Stock Exchange ("ASX") – Australian Securities and Investments Commission ("ASIC") brought proceedings against respondents (and others) for contraventions of the Act – Section 180(1) of the Act required directors and officers to act with degree of care and diligence that reasonable person in that position would exercise – ASIC alleged directors contravened s 180(1) by approving draft announcement not materially different from misleading announcement released to ASX – ASIC alleged company secretary and general counsel of corporation contravened s 180(1) by not advising board that draft announcement was misleading – Whether directors approved draft announcement.

Evidence – ASIC tendered minutes of board meeting recording tabling and approval of draft ASX announcement – Minutes subsequently approved – ASIC did not call corporation's solicitor, who had supervised preparation of draft minutes and attended board meeting – Whether ASIC owed respondents a "duty of fairness" in its conduct of litigation – Whether ASIC breached putative duty by not calling solicitor – Whether proper consequence of any such breach was to discount cogency of ASIC's case – Whether board minutes sufficient evidence to prove directors' approval of draft announcement.

Words and phrases – "cogency of proof", "duty of fairness", "obligation of fairness", "onus of proof", "satisfaction on the balance of probabilities".

Corporations Act 2001 (Cth), ss 180(1), 251A, 1317L.
Evidence Act 1995 (NSW), s 140.
Judiciary Act 1903 (Cth), ss 64, 79, 80.

FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ.

The principal issues

1 The Australian Securities and Investments Commission ("ASIC") may apply[1] for a declaration of contravention of civil penalty provisions of the *Corporations Act* 2001 (Cth) ("the Corporations Act")[2], pecuniary penalty orders[3], compensation orders[4] and orders disqualifying a person from managing corporations for a period[5]. In proceedings in which declarations of contravention, pecuniary penalty orders and disqualification orders were sought, ASIC alleged that the defendants who are the present respondents had each breached his or her duty as a director or an officer of a listed public company. ASIC alleged, and the directors denied, that the directors had approved the company's releasing to the Australian Stock Exchange ("the ASX") an announcement that was misleading. The minutes of the board meeting, confirmed at a subsequent board meeting, recorded the tabling of a draft announcement and its approval by the board.

2 ASIC's witnesses were found to have no actual recollection of relevant events at the meeting (a meeting which had occurred more than seven years before they gave their evidence at trial). The defendants submitted that ASIC did not prove that a draft announcement had been tabled at the meeting or approved by the board. The draft announcement that had been prepared just before the board meeting had not been included in the papers the board members were sent and was altered by management after the board meeting without reference to the board. The minutes of the board meeting were shown to be inaccurate in some respects. The company's solicitor, who had attended the meeting and supervised the preparation of draft minutes for the meeting, was not called by ASIC to give evidence.

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1 *Corporations Act* 2001 (Cth) ("the Corporations Act"), s 1317J(1).

2 Civil penalty provisions are identified in s 1317E(1).

3 s 1317G.

4 s 1317H.

5 ss 206C, 206E.

3 Did the facts that the draft announcement was altered after the meeting and that the minutes were shown to be wrong in some respects, coupled with ASIC's not calling the company's solicitor, entail that ASIC failed to prove that the draft announcement was tabled and approved? In particular, was the Court of Appeal right to overturn the primary judge's finding that the board had approved the draft announcement on the footing that "the cogency of ASIC's case" was undermined by its failure to call the solicitor when not calling the solicitor was "contrary to [ASIC's] obligation of fairness"?

4 The issues identified arise in appeals brought by ASIC against orders of the Court of Appeal of the Supreme Court of New South Wales[6] (Spigelman CJ, Beazley and Giles JJA) setting aside declarations of contravention, pecuniary penalty orders and disqualification orders made at first instance[7] in respect (among others) of seven non-executive directors of James Hardie Industries Ltd ("JHIL") – Meredith Hellicar, Michael Robert Brown, Michael John Gillfillan, Martin Koffel, Gregory James Terry, Geoffrey Frederick O'Brien and Peter John Willcox – and in respect of JHIL's general counsel and company secretary – Peter James Shafron.

5 The appeals raise issues of considerable public importance. Their disposition requires a close consideration of particular aspects of the evidence before the primary judge, his findings of fact, and conclusions of fact reached by the Court of Appeal. That consideration directs attention to the significance of minutes of meetings of directors as evidence of decisions taken at their meetings.

6 The Court of Appeal was wrong to conclude that ASIC did not prove that the draft ASX announcement in question was tabled and approved at the board meeting.

7 The minutes of the board's meeting were a formal record (subsequently adopted by the board as a correct record) of what had happened at the meeting. That record was created and adopted close to the time of the events in question.

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6 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205.

7 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199; *Australian Securities and Investments Commission v Macdonald (No 12)* (2009) 259 ALR 116.

The minutes were evidence of the truth of the matters recorded – in particular, that a draft ASX announcement was tabled and approved.

8 The minutes were not shown to have recorded falsely that the draft announcement was tabled and approved. The matters on which the respondents relied as founding an inference, or otherwise demonstrating, that the minute recording the tabling and approval of a draft announcement was false were not inconsistent with the minutes being accurate. None of those matters required the conclusion that no draft ASX announcement was tabled or the further conclusion that no draft ASX announcement was approved.

9 The Court of Appeal was wrong to hold that ASIC breached a duty of "fairness" by not calling the solicitor. The Court of Appeal further erred in concluding that a failure to call a witness, in breach of a duty of "fairness", diminished the cogency of the evidence that was called.

10 Other, related issues are raised by an appeal brought by Mr Shafron against certain findings of contravention of s 180(1) of the Corporations Act concerning what advice he should have given the board or JHIL's managing director and chief executive officer. The particular issues raised by Mr Shafron's appeal will be considered[8] separately.

11 The balance of these reasons is organised as follows:

Some basic facts	[12]-[19]
The proceedings	[20]-[22]
First instance	[23]-[29]
Appeal to the Court of Appeal	[30]-[35]
Some undisputed facts	[36]-[38]
The respondents' principal arguments	[39]-[40]
Proposals for separation	[41]-[52]
The central conundrum	[53]-[64]
The board minutes	[65]-[71]
Why start with the board minutes?	[72]-[75]
Alterations to the 7.24 draft announcement	[76]-[110]
The inaccuracies in the minutes	[111]-[116]
The significance of inaccuracies in the minutes	[117]-[122]

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8 *Shafron v Australian Securities and Investments Commission* [2012] HCA 18.

Mr Brown and the "correlation evidence" [123]-[132]
Absence of later protest [133]-[138]
A "failure" to call Mr Robb? [139]-[146]
The source and content of the duty of fairness? [147]-[155]
No unfairness in fact [156]-[163]
The cogency of proof [164]-[170]
Conclusion and orders [171]-[178]

Some basic facts

12 Until October 2001 JHIL was the ultimate holding company of the James Hardie group of companies. JHIL was a listed public company; its shares were listed on the ASX. Two wholly owned subsidiaries of JHIL, James Hardie & Coy Pty Ltd ("Coy") and Jsekarb Pty Ltd ("Jsekarb"), had manufactured and sold products containing asbestos. Each of Coy and Jsekarb was subject to claims for damages for personal injury suffered by those who had come in contact with its asbestos products.

13 In 2001 the board of JHIL expected that there would be further claims made against Coy and Jsekarb. The board of JHIL decided to restructure the James Hardie group by "separating" Coy and Jsekarb from the rest of the group. This was to be done by JHIL establishing a foundation (the Medical Research and Compensation Foundation – "the MRCF") to manage and pay out asbestos claims made against Coy and Jsekarb and to conduct medical research into the causes of, and treatments for, asbestos-related diseases. Jsekarb and Coy would make a Deed of Covenant and Indemnity with JHIL under which Jsekarb and Coy would make no claim against and indemnify JHIL in respect of all asbestos-related liabilities and, in return, JHIL would, over time, pay Jsekarb and Coy an amount of money. New shares would be issued by Coy and Jsekarb to be held by or for the ultimate benefit of the MRCF; JHIL's shares in both Coy and Jsekarb would be cancelled. A new company, James Hardie Industries NV ("JHINV"), would be incorporated in the Netherlands and that company would become the immediate holding company of JHIL and ultimate holding company of the James Hardie group.

14 On 15 February 2001, the board of JHIL met to consider the separation proposal. What happened at that board meeting is the focus of these proceedings.

15 Minutes of the meeting of the directors of JHIL held on 15 February 2001 were confirmed by the board, at a meeting held on 3-4 April 2001, as a correct record and subsequently "[s]igned as a correct record" by the chairman of the

board at or after that April meeting. All of the directors of JHIL had received the minutes of the February meeting with their board papers for the April meeting. One of the respondents in this Court, Mr Willcox, did not attend the April meeting; all other respondents did.

16 The minutes of the meeting of 15 February 2001 recorded a number of matters relating to the separation proposal. They included the board's resolution that "it is in the best interests of [JHIL] to effect the Coy and Jsekarb Separation" and a number of other resolutions relating to the separation. Critical to the present matters, the minutes recorded:

> "**ASX Announcement**
>
> The Chairman tabled an announcement to the ASX whereby the Company explains the effect of the resolutions passed at this meeting and the terms of the Foundation (ASX Announcement).
>
> **Resolved** that:
>
> (a) the Company approve the ASX Announcement; and
>
> (b) the ASX Announcement be executed by the Company and sent to the ASX."

17 On 16 February 2001, JHIL sent to the ASX a media release entitled "James Hardie Resolves its Asbestos Liability Favourably for Claimants and Shareholders" ("the final ASX announcement"). The document referred to the establishment of the MRCF. It said, among other things:

> "The Foundation [MRCF] *has sufficient funds to meet all legitimate compensation claims anticipated* from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL [Coy and Jsekarb].
>
> JHIL CEO Mr Peter Macdonald said that the establishment of a *fully-funded* Foundation provided certainty for both claimants and shareholders.
>
> …
>
> In establishing the Foundation, James Hardie sought expert advice from a number of firms, including PricewaterhouseCoopers, Access Economics

and the actuarial firm, Trowbridge. With this advice, supplementing the company's long experience in the area of asbestos, *the directors of JHIL determined the level of funding required by the Foundation*.

'*James Hardie is satisfied that the Foundation has sufficient funds to meet anticipated future claims*,' Mr Macdonald said." (emphasis added)

18 The MRCF did not have sufficient funds to meet all legitimate compensation claims which were reasonably anticipated in February 2001 from people injured by asbestos products that were manufactured in the past by Coy and Jsekarb.

19 It was found at trial[9] and on appeal to the Court of Appeal[10] that, in February 2001, the directors of JHIL ought to have known that these statements about the MRCF's funding were misleading in four particular respects. Neither the finding that the statements were misleading in each of those respects, nor the finding that the directors ought to have known that the statements were misleading, was put in issue in this Court. The central issue in this Court was whether the Court of Appeal should have found, as it did[11], that ASIC had not proved that a draft of the announcement made to the ASX by JHIL was tabled at the February meeting of the board and had not proved that the directors approved that draft.

The proceedings

20 In February 2007, ASIC commenced proceedings in the Supreme Court of New South Wales[12] against those who ASIC alleged had been directors and officers of JHIL at relevant times, and against both JHIL and JHINV. Attention may be confined to the proceedings against directors and officers. Not all of the natural persons who were defendants at first instance are parties to ASIC's present appeals.

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9 (2009) 256 ALR 199 at 259-260 [320]-[322], [325], 298 [619]-[620].

10 (2010) 274 ALR 205 at 360 [831].

11 (2010) 274 ALR 205 at 349-350 [789]-[796].

12 Corporations Act, s 1337B(2).

21 ASIC alleged, among other things, that those who are the respondents to ASIC's appeals in this Court were directors (or, in the case of Mr Shafron, an officer) of JHIL in February 2001. ASIC alleged that at the meeting of the board of JHIL held on 15 February 2001 a draft ASX announcement was tabled and approved by the board. ASIC alleged that the draft announcement had included statements about the sufficiency of the MRCF's funds to meet asbestos claims that were misleading and that the final ASX announcement was not materially different from the draft. ASIC alleged, among other things, that the directors, by approving the draft announcement, contravened s 180(1) of the then applicable corporations legislation[13] and thus, by operation of relevant transitional provisions[14], s 180(1) of the Corporations Act. That is, ASIC alleged that each director of JHIL who is now a respondent had failed to discharge his or her duties to JHIL with the degree of care and diligence that a reasonable person would exercise if they were a director of a corporation in JHIL's circumstances, and had the responsibilities which the director in question had. ASIC further alleged (among other things) that Mr Shafron, as general counsel and company secretary, should have advised the board that the draft ASX announcement "was expressed in too emphatic terms concerning the adequacy of Coy and Jsekarb's funding to meet all legitimate present and future asbestos claims"[15].

22 ASIC sought declarations of contravention, pecuniary penalties and orders disqualifying the respondents from managing corporations.

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13 The Corporations Law of New South Wales set out in s 82 of the *Corporations Act* 1989 (Cth): *Corporations (New South Wales) Act* 1990 (NSW), s 7.

14 The *Corporations Act* 1989 (Cth) was repealed by s 3 and item 2 of Sched 1 of the *Corporations (Repeals, Consequentials and Transitionals) Act* 2001 (Cth) when the *Corporations Act* 2001 (Cth) commenced. Pursuant to s 1400(1) and (2) of the *Corporations Act* 2001, a person who had incurred a liability for a breach of s 180(1) of the Corporations Law incurred an equivalent liability for breach of s 180(1) of the *Corporations Act* 2001.

15 (2009) 256 ALR 199 at 386 [1271].

First instance

23 After a lengthy trial, the primary judge, Gzell J, found[16] that the present respondents had breached their duties under s 180(1) and subsequently made[17] declarations of contravention and other orders in respect of each of the present respondents. The primary judge dismissed[18] the applications made by the present respondents to be excused[19] from their breaches and made disqualification orders[20] and pecuniary penalty orders[21] against each of them.

24 The declaration of contravention that was made in respect of each of Ms Hellicar and Messrs Brown, Terry, O'Brien and Willcox declared that at the February board meeting the director concerned had approved a draft ASX announcement which conveyed, or was capable of conveying, four statements which the director ought to have known were misleading. Those statements were[22] that:

(a) the material available to JHIL provided a reasonable basis for the assertion that it was certain that the amount of funds made available to the MRCF would be sufficient to meet all legitimate present and future asbestos claims brought against Coy and Jsekarb;

(b) JHIL's chief executive officer, Peter Donald Macdonald, believed that it was certain that the amount of funds made available to the MRCF would be sufficient to meet all legitimate present and future asbestos claims brought against Coy and Jsekarb;

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16 (2009) 256 ALR 199.

17 (2009) 259 ALR 116.

18 (2009) 259 ALR 116 at 128 [67], 136 [128], 138 [147].

19 Corporations Act, ss 1317S(2), 1318(1).

20 (2009) 259 ALR 116 at 174 [331], 176 [354].

21 (2009) 259 ALR 116 at 179-180 [379], [383], [391].

22 (2009) 259 ALR 116 at 195-196 [475]; (2010) 274 ALR 205 at 353-354 [803].

(c) all of the directors, or at least a majority of them, believed that it was certain that the amount of funds made available to the MRCF would be sufficient to meet all legitimate present and future asbestos claims brought against Coy and Jsekarb; and

(d) JHIL had received expert advice from PricewaterhouseCoopers and Access Economics that supported the statement that it was certain that the amount of funds made available to the MRCF would be sufficient to meet all legitimate present and future asbestos claims brought against Coy and Jsekarb.

25 The declaration made in respect of each of Messrs Gillfillan and Koffel was to the effect that he breached his duties by voting in favour of the resolution without either asking for a copy of the draft announcement or knowing its terms, or by failing to abstain from voting in favour of approval of the announcement[23].

26 The declarations made[24] in respect of Mr Shafron hinged about: first, his not having tendered advice to the board that the draft announcement was "expressed in too emphatic terms" concerning the adequacy of funding and that the draft announcement was misleading; second, his not having advised the board that the advice given by PricewaterhouseCoopers and Access Economics about a cash flow model of funding available to meet asbestos claims was limited and had not verified important assumptions that the advisers had been given and instructed not to consider; and, third, his not having advised the chief executive officer or the board to consider whether some information about the Deed of Covenant and Indemnity to be given by Coy and Jsekarb to JHIL should be disclosed to the ASX. As noted at the outset of these reasons, issues about all except the first of these contraventions by Mr Shafron will be examined separately.

27 The steps which the primary judge took in deciding to make the declarations of contravention concerning the approval of a draft ASX announcement can be summarised as follows:

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23 (2009) 259 ALR 116 at 196 [477]-[478]; (2010) 274 ALR 205 at 361-362 [839].

24 (2009) 259 ALR 116 at 193-195 [473]; (2010) 274 ALR 205 at 373-374 [879].

(1) A draft ASX announcement was taken to the board meeting of 15 February 2001 by JHIL's Senior Vice-President of Corporate Affairs, Mr Greg Baxter[25].

(2) The draft Mr Baxter took to the meeting was what came to be known as the "7.24 draft announcement" or the "draft ASX announcement" (a draft which Mr Baxter sent by email at 7.24 on the morning of 15 February 2001)[26].

(3) The 7.24 draft announcement was distributed, at the board meeting, to each director who was physically present when the board considered the separation proposal[27]. They were the chairman, Mr A G McGregor, five non-executive directors (Ms Hellicar and Messrs Willcox, Brown, Terry and O'Brien) and Mr Macdonald (the chief executive officer of JHIL). In addition, the 7.24 draft announcement was distributed to Mr Shafron[28] and two representatives of JHIL's lawyers (Allen Allen & Hemsley – "Allens") who attended the meeting: Mr David Robb and Mr Peter Cameron.

(4) One or both of Mr Macdonald and Mr Baxter spoke to the 7.24 draft announcement at the meeting[29]. The purpose of distribution and discussion of the draft announcement "was to approve its release"[30].

(5) The practice of the JHIL board was not to put a matter formally to a meeting as a resolution. The chairman would summarise the position and directors assented by indicating their approval or remaining silent[31].

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25 (2009) 256 ALR 199 at 240 [193]-[194].

26 (2009) 256 ALR 199 at 243 [220].

27 (2009) 256 ALR 199 at 243 [220]-[221].

28 (2009) 256 ALR 199 at 267 [375].

29 (2009) 256 ALR 199 at 244 [223].

30 (2009) 256 ALR 199 at 244 [224].

31 (2009) 256 ALR 199 at 245 [234].

(6) The 7.24 draft announcement was before the board, was considered by the board, and was approved by the board[32].

(7) Neither of the two directors of JHIL who participated in the meeting by telephone (Messrs Gillfillan and Koffel) raised any objection that he did not have a copy of the 7.24 draft announcement; neither asked for a copy of it; neither abstained from approving the draft announcement[33].

(8) Those non-executive directors who were in physical attendance at the meeting (Ms Hellicar and Messrs Willcox, Brown, Terry and O'Brien) breached s 180(1) by assenting to the resolution approving the 7.24 draft announcement[34].

(9) Each non-executive director who participated in the meeting by telephone (Messrs Gillfillan and Koffel) breached s 180(1) by failing either to request a copy or familiarise himself with the contents of the 7.24 draft announcement or to abstain from voting in favour of the resolution[35].

(10) The general counsel and company secretary of JHIL (Mr Shafron) did not advise, but should have advised, the board that the 7.24 draft announcement "was expressed in too emphatic terms concerning the adequacy of Coy and Jsekarb's funding to meet all legitimate present and future asbestos claims and in that respect it [the announcement] was false or misleading"[36]. Failing to proffer advice of this kind was a failure to discharge his duties to JHIL with the degree of care and diligence that a reasonable person would exercise if he or she were an officer of a corporation in JHIL's circumstances, occupied the office of general counsel and company secretary and had the same responsibilities within the corporation as Mr Shafron; it constituted a breach of s 180(1)[37].

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32 (2009) 256 ALR 199 at 244 [225].

33 (2009) 256 ALR 199 at 245 [233].

34 (2009) 256 ALR 199 at 260-261 [330]-[336], 262 [341]-[343].

35 (2009) 256 ALR 199 at 261-262 [337]-[339].

36 (2009) 256 ALR 199 at 271 [406].

37 (2009) 256 ALR 199 at 271 [406].

28 At trial, ASIC called two witnesses who had attended the relevant part of the board meeting of 15 February 2001 – Mr Baxter and Mr Stephen Harman, the financial controller of JHIL.

29 Not all non-executive directors gave evidence at the trial. Mr Brown, Mr Gillfillan, Ms Hellicar, Mr Koffel and Mr Willcox did (as also did Mr Phillip Morley, the chief financial officer of JHIL and a director of Coy and Jsekarb until 15 February 2001). Mr O'Brien and Mr Terry did not give evidence. Neither Mr Macdonald (a defendant in the proceedings) nor Mr Shafron gave evidence. Neither ASIC nor any defendant called either of the two bankers from UBS Australia (Mr Anthony Sweetman and Mr Ian Wilson) who attended the meeting. Neither ASIC nor any defendant called Mr Robb of JHIL's solicitors, Allens. (The other representative of Allens at the meeting – Mr Peter Cameron – had died on 21 February 2006. The chairman of JHIL, Mr McGregor, had also died before trial.)

Appeal to the Court of Appeal

30 The present respondents appealed to the Court of Appeal against the declarations of contravention, pecuniary penalty orders and disqualification orders, and against the primary judge's refusal to excuse the contravention. They submitted that the primary judge should not have found that the draft ASX announcement which ASIC alleged had been tabled and approved at the February board meeting had been either tabled or approved.

31 The Court of Appeal concluded[38] that ASIC did not establish at trial that the 7.24 draft announcement was tabled at the February board meeting or that the non-executive directors had approved that draft announcement. The Court of Appeal allowed[39] the appeals by the present respondents. The Court of Appeal set aside the declarations and orders made against each of the non-executive directors and ordered that ASIC's proceedings against those parties be dismissed. In Mr Shafron's case the Court of Appeal set aside the declaration of contravention that had been made in relation to the approval of the draft ASX announcement (and made other orders in connection with issues raised by other

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38 (2010) 274 ALR 205 at 349-350 [789]-[796].

39 (2010) 274 ALR 205 at 429-430 [1156].

contraventions by Mr Shafron that are considered in Mr Shafron's appeal to this Court).

32 The Court of Appeal treated[40] the issues about what happened at the meeting as "not wholly a case of circumstantial evidence, because there is evidence such as the minutes of the meeting", but said: "None the less, we consider that we should take a similar approach, and so will determine whether ASIC proved the passing of the draft ASX announcement resolution from 'the united force' of all the evidence."

33 The Court of Appeal made a minutely detailed examination in its reasons of all of the evidence that any party to the appeals to that Court suggested might bear upon what should be found to have been said or done at the meeting of the board of JHIL on 15 February 2001. But as these reasons will demonstrate the matters to which the present respondents pointed in their arguments in the Court of Appeal and again on appeal to this Court as bearing upon what should be found to have been said or done at that meeting were not of equal significance.

34 As noted earlier, ASIC called Mr Baxter and Mr Harman to give evidence about the relevant parts of the February board meeting. The Court of Appeal concluded[41] that "[n]either Mr Baxter nor Mr Harman had an actual recollection of what occurred at the meeting". The Court of Appeal accepted[42] that it could not reasonably be doubted that Mr Baxter took a draft announcement to the board meeting of 15 February 2001 and concluded[43] that the particular draft taken was the 7.24 draft announcement. The Court of Appeal further concluded[44] that it was more probable than not that a copy of the 7.24 draft announcement was given to the two representatives of JHIL's solicitors, Allens – Mr Peter Cameron and Mr Robb – at the February board meeting. But, as noted, the Court of Appeal was not satisfied[45] that the 7.24 draft announcement was tabled or that the

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40 (2010) 274 ALR 205 at 265 [286].

41 (2010) 274 ALR 205 at 255 [232].

42 (2010) 274 ALR 205 at 278 [363].

43 (2010) 274 ALR 205 at 281 [383], 349 [789].

44 (2010) 274 ALR 205 at 281 [383].

45 (2010) 274 ALR 205 at 349-350 [789]-[796].

non-executive directors of JHIL voted in favour of a resolution approving the announcement and its being sent to the ASX.

35 The Court of Appeal held[46] that only "[s]ome strength in ASIC's case [lay] in the minutes of the February meeting and their adoption at the April meeting". The Court of Appeal concluded[47] that although "[t]here was some basis for finding that the draft ASX announcement resolution had been passed … [h]aving 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".

Some undisputed facts

36 Throughout the consideration of the issues argued in these appeals, it will be necessary to keep some undisputed facts at the forefront of consideration.

37 The JHIL board agreed at the meeting of 15 February to the separation of Coy and Jsekarb from the James Hardie group. The making of that decision, and the terms on which the separation was to be effected, were matters that had to be announced[48] to the ASX. (Both the decision to separate and the terms on which the separation would be effected constituted information "that a reasonable person would expect to have a material effect on the price or value"[49] of JHIL's shares.) Mr Baxter took the 7.24 draft announcement about the separation to the meeting. An announcement about the separation was made to the ASX on the day after the separation decision was made. (As these reasons later demonstrate, the announcement was made in terms that were not materially different from the draft that Mr Baxter took to the meeting.) The announcement was misleading. The minutes of the February meeting recorded the directors' approval of the draft announcement. In April the directors approved the minutes of the February meeting as an accurate record of what was decided at that meeting.

38 If, as the Court of Appeal concluded, no one gave direct evidence of what happened at the February meeting, why should it not be found in the light of

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46 (2010) 274 ALR 205 at 349 [791].

47 (2010) 274 ALR 205 at 350 [796].

48 Corporations Law, ss 111AB-111AE, 1001A, 1001D; ASX Listing Rules, r 3.1.

49 ASX Listing Rules, r 3.1.

these established facts that, as the primary judge found, the 7.24 draft announcement was tabled and approved at the meeting?

The respondents' principal arguments

39 The respondents submitted in this Court, as they had in the Court of Appeal, that the primary judge was wrong to conclude that the 7.24 draft announcement was tabled or approved at the February board meeting. They submitted that the 7.24 draft announcement was changed in a number of ways after the board meeting had finished and that those changes would not have been made if it had been tabled and approved. They submitted that the minutes did not accurately record the order in which matters were considered at the February meeting and that there were other demonstrable errors in the minutes. (The respondents attributed the subsequent approval of the minutes to the respondents' own want of care.) And the respondents submitted that the Court of Appeal was right to place the emphasis it did on the circumstance that ASIC did not call Mr Robb to give evidence of what he had seen and heard at the February meeting.

40 Before dealing with these arguments there are some matters of history to which reference must be made.

Proposals for separation

41 Since as early as 1996, the board of JHIL had been considering and taking some steps towards a corporate restructuring of the James Hardie group. As part of that restructuring, JHIL's directors had been considering separation of "the asbestos litigation poison pill" from the "operating assets" since at least December 1999.

42 In April 2000, the board was told that the restructuring could be disrupted or hindered if the separation was seen as "James Hardie abandoning its responsibilities to claimants". Thereafter the board considered separation proposals at several meetings. It is enough to direct attention to the board meetings of January 2001 and February 2001.

43 A detailed paper was put to the board in January 2001 considering "the establishment of a stand alone trust company to manage the asbestos liabilities in the James Hardie Group". The objective of establishing the trust was described as being that "[a]sbestos liabilities would be effectively, but not completely, separated from [JHIL]". The paper recorded that JHIL then accounted for

asbestos liabilities "by providing for the expected costs of *known* claims" (emphasis added). But as the paper also recorded, when Australian Accounting Standards Board, *Provisions and Contingencies*, Exposure Draft No 88, December 1997 ("ED88") became effective – then expected to be in March 2003 – it seemed "probable" that JHIL would have to provide "for at least the minimum amount of the *expected future* liability" and "significant disclosure concerning the nature and extent of *potential future asbestos liabilities* will have to be made" (emphasis added).

44 The proposal put to the board at its January meeting – the "net assets model" – proceeded from the premises (noted[50] by the Court of Appeal) that "the maximum quantum of funds available to Australian asbestos claimants is the existing net assets of [Coy] and Jsekarb" and that "[t]here is no sound rationale for increasing the net assets of [Coy] and Jsekarb and thereby expanding this quantum of funds available to claimants". Accordingly, the proposal put to the board was that JHIL give its shares in Coy and Jsekarb to a trust and that the net assets of Coy and Jsekarb be applied by the trust to meeting existing and future asbestos claims. In addition, JHIL would give $2 million to the trust for research into asbestos-related diseases.

45 The board paper for the January meeting explained, under the heading "Risks", that "[t]he creation of the Trust would … carry with it the message that JHIL would not support [Coy] and Jsekarb in the event that funds prove to be insufficient". It also said that the "effect of the Trust and associated arrangements" may be subject to "attack", including through legislation by which JHIL was "declared liable for all of the asbestos related liabilities of its subsidiaries" or by the freezing of JHIL's assets "pending undertakings [being given] suitable to" government.

46 A slide presentation made to the board at its January meeting emphasised the same concerns, saying, under the heading "Key Risks": "Separation per se not problematic, issue is statement not to support Coy". The presentation canvassed the "[p]ossible consequences" and said that the "[l]ikelihood of government action" – "making JHIL liable for conduct of subs" – "cannot be discounted".

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50 (2010) 274 ALR 205 at 224 [79].

47 The January board paper and the slide presentation made to the board at its January meeting each dealt extensively with a "Communications Strategy". The recommendations made in the board paper about "how to announce any establishment of a Trust" were said to be:

> "developed with the aims of:
>
> - positioning the initiative as a 'business' news as opposed to a 'general' news story;
> - having financial markets recognise and reward the certainty and finality of separation;
> - attracting as little attention as possible beyond the financial markets;
> - managing fallout and minimising damage to James Hardie's reputation generally; and
> - minimising the potential for government intervention."

The board paper recorded, under the heading "Timing", that it was recommended that "any announcement be made on Friday 16 February to coincide with the announcement of JHIL's Q3 results and the related management presentations to analysts and business media". It was said that this would "help us position the Trust as a 'business' story". As the Court of Appeal noted[51], there was attached to the January board paper a "draft news release" which "can be seen as the beginnings of the draft [ASX] release in issue in these proceedings". The slide presentation was to the same effect as the board paper.

48 The minutes of the January meeting referred to "a stand alone trust company that could support asbestos related medical research and manage the asbestos liability of subsidiary companies". The minutes recorded that:

> "The directors discussed the trust concept and asked questions of management and advisers.

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51 (2010) 274 ALR 205 at 224 [81]. See also (2009) 256 ALR 199 at 220 [87].

> The Chairman noted that the concept appeared to have some merit, but that the question of funding for the Company required more work. He requested management to continue developing the concept and to report progress, particularly in relation to funding, at the February meeting."

In fact, the board had rejected[52] the net assets model of funding the proposed trust. As the primary judge recorded[53], "management was sent away to do more work on the separation proposal to *ensure* sufficient funds were available to meet *all* present and future asbestos claims" (emphasis added).

49 The matter was again put before the board at its next meeting: the meeting of 15 February 2001. Under a new proposal, JHIL not only would "vest" shares in Coy and Jsekarb in the trust that was to be established and give an increased amount of $3 million for research but also would pay, over time, $100 million ($70 million net present value) to Coy and Jsekarb. In return, Coy and Jsekarb would each indemnify JHIL against any liabilities JHIL incurred in respect of asbestos claims and each promise not to make any asbestos-related claim against JHIL. (Coy would also promise to acquire all shares in JHIL from a sole shareholder if certain conditions were satisfied. This was referred to at trial as the "put option"[54], but that aspect of the proposal was not in issue in the appeals to this Court and need not be noticed further.) The payment of $100 million over time and the promises by Coy and Jsekarb were to be provided for in the Deed of Covenant and Indemnity.

50 The board papers for the February meeting were sent to directors in early February and included a paper by Mr Macdonald (the chief executive officer of JHIL) recommending that JHIL "Implement Separation by creating a Foundation now". As with the January proposal, the paper recorded Mr Macdonald's recommendation that the JHIL board agree to the creation of the MRCF at its meeting on 15 February "for announcement, together with JHIL's Q3 results, on Friday 16 February". Mr Macdonald concluded his paper by saying that "James Hardie needs to act now". The reason he gave for the urgency was that the new accounting standard (ED88) was now likely to be promulgated before the end of JHIL's financial year (which ended on 31 March). (As noted earlier in these

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52 (2009) 256 ALR 199 at 221 [89]; (2010) 274 ALR 205 at 226 [91], 228 [99].

53 (2009) 256 ALR 199 at 221 [89].

54 (2009) 256 ALR 199 at 208 [18].

reasons, the board had been told at its January meeting that the new standard would adversely affect the company's accounts by requiring provision for not only present but also expected future asbestos liabilities.)

51 Attachments to the board paper identified what were described as "separation issues" and a "communication strategy". The "communication strategy" recorded that "[o]ur 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".

52 At the February meeting, a series of slides was presented to the board. One slide, entitled "Update on Board paper", recorded that "[s]ince we issued the Board paper, we have continued to investigate and analyse the key risks and fine-tune our key messages and strategy". The slides showed that the amount to be contributed over time by JHIL to Coy and Jsekarb was $112 million (with a net present value of $72 million). The board papers distributed earlier in the month had said that the amount would be $100 million (with a net present value of $70 million). Under the heading "Fund life expectancy/sensitivity" reference was made to the key assumptions that had been used in modelling the availability of funds to meet expected claims and it was said: "Surplus most likely outcome". Two of the "[k]ey messages" set out in another slide were that "[t]he Foundation expects to have enough funds to pay all claims" and that "[t]he position of claimants is substantially improved because the Foundation provides much greater certainty that compensation will be available to meet all future claims". And many of the slides were devoted to identifying how the company would (as one slide put it) "'sell' the proposal to external stakeholders".

The central conundrum

53 The directors denied that they had approved any draft ASX announcement at the February board meeting. That is, the directors denied that they had approved the 7.24 draft announcement, which said that the MRCF would have "sufficient funds to meet all legitimate compensation claims" anticipated and was "fully-funded".

54 That answer to ASIC's case necessarily contained some intrinsic tensions if not outright contradictions.

55 After a process of consideration and development that had gone on for well over a year, the board approved a separation proposal in February 2001.

The board did that having refused to approve a different separation proposal at the immediately preceding board meeting (in January 2001) and having required management to continue to develop the concept "particularly in relation to funding". It is thus evident that the directors regarded the funding of the MRCF as a centrally important issue and it could not be assumed that the directors approved the separation proposal not having any view about whether the MRCF would have sufficient funds. The respondents did not suggest to the contrary.

56 Before the February board meeting was held, the company's solicitors prepared (under the supervision of Mr Robb) draft minutes for the meeting which provided for the tabling and adoption of a draft ASX announcement. That the draft minutes made that provision reflected, first, the company's obligation to make the announcement and, second, the fact that an announcement of this kind would ordinarily be approved by the JHIL board.

57 After the board meeting an announcement was made to the ASX. The announcement was not identical to the draft that Mr Baxter took to the board meeting but, as will later be shown, it was not different in any material respect.

58 Mr Robb, who had supervised preparation of the draft minutes, attended the February board meeting. In late March Mr Robb sent a bill to JHIL for work done by Allens in relation to the separation proposal. The work included "settling various completion documents and board minutes as required by Alan Kneeshaw [the manager of secretarial services for the James Hardie group] for JHIL, Coy, Jsekarb, the Foundation and MRCFI [a wholly owned subsidiary of the MRCF]".

59 Draft minutes of the February meeting (which included reference to the tabling and adoption of a draft announcement) were distributed to all board members with the board papers for the April board meeting and were adopted (apparently without demur) at the April board meeting. Either those minutes were right to record the directors' approval of a draft announcement or they were not. By adopting the minutes the board members indicated that they had assented to the several steps recorded in those minutes as having been taken at the February board meeting to approve and effect the separation of Coy and Jsekarb, including the step of approving a draft announcement to the ASX.

60 The directors knew that their approval of the proposal had to be announced to the ASX. Did they, as they now say, leave to the decision of management the way in which the decision would be announced and leave to the decision of management what would be said about a proposal that all directors

knew could be very controversial? Or did they, as their minutes recorded, approve what was to be said to the market?

61 The principal changes that were made to the separation proposal between the net assets model rejected at the January board meeting and the proposal that was approved at the February meeting were changes to increase the funds that Coy and Jsekarb would have to meet asbestos claims. The amount of money that JHIL would pay to Coy and Jsekarb was fixed having regard to advice which the board was told at its February meeting had been received from Mr Stephen Loosley, "former NSW Secretary ALP, former NSW Senator, now head of PWC Legal in Sydney": "to strengthen the adequacy of funding so that we could argue that the most likely outcome was that all claims would be met". The amount was fixed at a level sufficient to support one of the key messages the board was told was to be conveyed: that "[t]he Foundation expects to have enough funds to pay all claims". And the primary judge found[55] that one of the respondents, Mr Brown, asked the chief executive officer of JHIL during the February board meeting, "are you sure there are going to be sufficient funds in the trust?", and was told, "*Yes there are.* We have got the best actuarial modelling. We have shown that we can meet the cash requirements each year. *We are providing enough funds for future claims.*" (emphasis added)

62 Why would the directors not approve of a statement that said that the MRCF was fully funded and that it would have sufficient funds if that was the basis on which they approved the separation proposal? Why should the primary judge have concluded, as the respondents in this Court asserted, that the relevant minute of the February board meeting, adopted at the April meeting, was false?

63 As has been noted, the respondents advanced three arguments: first, that the making of alterations to the text of the 7.24 draft announcement after the board meeting showed that the announcement had been neither tabled at, nor approved by, the board at its February meeting; second, that the minutes of the February board meeting were demonstrably inaccurate in some respects; and finally, ASIC not having called Mr Robb to give evidence, that the Court of Appeal was right to conclude that ASIC had not proved its case.

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55 (2009) 256 ALR 199 at 234 [148]-[151].

64 It will be convenient to deal with these arguments in turn. But it is the minutes of the February and April board meetings that provide the necessary starting point for consideration of the issues which are raised by those arguments.

The board minutes

65 The text of the relevant part of the February board minutes has been set out earlier in these reasons. Reference has already been made to the board's approval, at its April meeting, of the minutes of the February meeting as an accurate record and to the chairman's signing the minutes "as a correct record".

66 Section 251A(1) of the Corporations Law provided (and at the time of the trial s 251A(1) of the Corporations Act provided) that a company "must keep minute books in which it records within 1 month: … (b) proceedings and resolutions of directors' meetings". Sub-section (2) of those provisions provided that the company:

> "must ensure that minutes of a meeting are signed within a reasonable time after the meeting by 1 of the following:
>
> (a) the chair of the meeting;
>
> (b) the chair of the next meeting."

Sub-section (6) provided:

> "A minute that is so recorded and signed is evidence of the proceeding, resolution or declaration to which it relates, unless the contrary is proved."

67 The primary judge found[56] that the minutes of the February meeting were not recorded in a minute book within one month of the meeting. That finding is not in issue. The primary judge further concluded[57] that:

> "Since the minutes of the 15 February 2001 meeting were not recorded in a minute book within 1 month, it follows that s 251A(6) was not engaged and the minutes have no special evidentiary value."

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56 (2009) 256 ALR 199 at 216 [56]. See also (2010) 274 ALR 205 at 296 [468].

57 (2009) 256 ALR 199 at 218 [72].

This conclusion, and the construction of the relevant provisions upon which it depended, were not challenged in the argument of the present matters and it is neither necessary nor appropriate to examine those matters further. Argument of the present appeals proceeded (and these reasons proceed) on the basis that tendering the minutes of the February board meeting worked no reversal of the onus of proof of the matters recorded in the minutes.

68 No separate consideration was given by the primary judge, or in the Court of Appeal, to whether s 251A(6) applied to the minutes of the April board meeting. It is, therefore, appropriate to assume that those minutes are not to be treated as evidence of the proceedings to which they relate unless the contrary was proved.

69 The minutes of both the February and April board meetings were admitted in evidence. Both sets of minutes were admissible as business records[58] and were evidence of the truth of the matters that they represented. The February board minutes were thus evidence of the facts that a draft ASX announcement was tabled and that it was approved; the April board minutes were evidence of the fact that the board had approved the minutes of the February meeting as an accurate record of proceedings at that earlier meeting.

70 The case which the respondents advanced was that the relevant minute in the February board minutes was false: no draft ASX announcement was tabled at the meeting; no draft ASX announcement was approved at that meeting. The case which the respondents advanced entailed that the board's subsequent adoption of the February board minutes as an accurate record of proceedings was also false, in the sense that the minutes that were adopted were not an accurate record of proceedings at and resolutions passed at the February meeting.

71 The respondents' allegations of falsity must be assessed in the light of not only the statutory provisions[59] requiring the keeping of minute books but also those statutory provisions[60] of the Corporations Law and the Corporations Act making it an offence for a person to make or authorise the making of a statement,

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58 *Evidence Act* 1995 (NSW), s 69.

59 s 251A.

60 s 1308(2), (4).

in a document required by or for the purposes of the Act, that, to the person's knowledge, is false or misleading in a material particular, and an offence to make or authorise the making of such a statement without having taken reasonable steps to ensure that it was not false or misleading. The respondents' arguments that the February and April minutes were false in the relevant respects were arguments that, if accepted, may go so far as to demonstrate that the respondents (other than Mr Shafron) had failed to take reasonable steps to ensure that the company's minute books were not false or misleading.

Why start with the board minutes?

72 As has already been noted, the minutes of the board meetings of February and April were evidence of the truth of what they represented.

73 The respondents submitted, in effect, that demonstration of any important error in the minutes cast doubt upon their accuracy in recording that a draft ASX announcement was tabled and approved. And at a more fundamental level, the respondents' submissions about the significance of inaccuracies in the minutes, alterations to the announcement and the absence of evidence from Mr Robb depended upon the proposition that the minutes were no more than one of several circumstances which bore upon the task of inferring (from the combined weight of the evidence) what had been said and done at the meeting. At times the respondents' submissions, and the reasoning in the Court of Appeal, veered towards the proposition that ASIC had had to prove at trial that the minutes were an accurate record. That was not the ultimate issue in the trial. Rather, the issue was, having regard to the nature of ASIC's claims and the respondents' defences, the nature of the subject-matter of the proceeding and the gravity of the matters which ASIC alleged[61], did ASIC establish, on the balance of probabilities, that (as the minutes recorded) the 7.24 draft announcement was tabled and approved by the board?

74 Witnesses who gave evidence at trial of what had happened at the meeting described conversations and events that had taken place many years earlier. The record of events at the February board meeting that was made closest to their occurrence was the minutes as they were adopted at the April board meeting. With the evidence that Mr Baxter gave about his taking the 7.24 draft

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61 *Evidence Act* 1995 (NSW), s 140(2); cf *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362 per Dixon J; [1938] HCA 34.

announcement to the board meeting (a fact not now in dispute) the force of the minutes was that the 7.24 draft announcement was approved. Absent evidence to the contrary, ASIC proved its case by tendering the minutes.

75 What the respondents sought to establish was that other evidence founded an *inference* that the minute recording approval of a draft announcement was false. It was the respondents' case that depended upon inference; ASIC's case did not. Hence the need to start with the minutes. To treat the minutes, as the Court of Appeal did, as just one of a number of circumstances that bore upon the issue of fact failed to recognise the nature of the evidence that ASIC adduced and the nature of the argument that the respondents sought to advance.

Alterations to the 7.24 draft announcement

76 The respondents gave great emphasis in their submissions in this Court, as they had at trial and on appeal to the Court of Appeal, to the way in which ASIC had pleaded its case. ASIC identified the relevant contraventions by reference to the 7.24 draft announcement. The respondents submitted, and it is to be accepted, that the trial was conducted on the footing that ASIC alleged that the directors had assented to a particular form of text – the 7.24 draft announcement – not on a footing that the directors had assented to particular messages being conveyed (whatever their form) that were messages capable of conveying particular misrepresentations. Thus, so the respondents submitted, the fact that management, with or without assistance from Allens, thought it open to them to change the text of the 7.24 draft announcement after the meeting (as they did) pointed against the board having approved the text which ASIC alleged had been tabled at the meeting and approved by the board.

77 The final text of the announcement sent to the ASX differed from the text of the 7.24 draft announcement in several respects. The 7.24 draft announcement was itself a revision of an earlier draft. The revisions to that earlier draft were made by Mr Baxter. At 7.24 am on 15 February 2001, Mr Baxter sent the revised draft back to its author (with text boxes on the draft showing the changes he had made) and he told the author:

> "here are my comments on the news release – no doubt we can refine further later today – *this is the version I will take to the Bd meeting*". (emphasis added)

78 Copies of a draft ASX announcement in the form of the 7.24 draft announcement (but without the text boxes appearing on the copy which

Mr Baxter had sent at 7.24 am) were produced to ASIC from the files at Allens, JHIL's solicitors, and the files of a company in the Brierley group of companies (BIL Australia Pty Ltd – "BIL"), a group which held a substantial shareholding in JHIL, and a group with which two of the respondents – Mr O'Brien and Mr Terry – were associated. Allens produced two copies of the draft, each with handwritten comments of Mr Robb and one with comments presumed[62] to be by Mr Peter Cameron. ASIC relied on the fact that Allens and BIL had the 7.24 draft announcement as showing that the 7.24 draft announcement had been distributed to those who attended the February board meeting. That other directors had not produced a copy of it was explained by the practice of those other directors who gave evidence at the trial not to keep copies of board papers[63]. That JHIL did not have the 7.24 draft announcement in its files was explained by the evidence of Mr Donald Cameron (another company secretary of JHIL) that only the final version of any ASX announcement was kept by the company, all earlier drafts being destroyed[64].

79 ASIC's submission that production of the 7.24 draft announcement by Allens and BIL demonstrated that the representatives of Allens and BIL who attended the February meeting received the document there should be accepted. The Court of Appeal found[65] that the two Allens lawyers were given the draft at the February meeting. The submission advanced by some respondents that the document might have come into the possession of BIL after the meeting does not accommodate the fact that the 7.24 draft announcement was soon superseded. The alternative explanations for BIL having a copy of the document advanced by the respondents (founded on Mr O'Brien of BIL having "separate lines of communication outside of JHIL Board meetings with management and in particular Mr Macdonald" or upon the possibility that the document had come to BIL during later proceedings[66]) were speculative and improbable. And once it is decided, as it was both at trial and on appeal to the Court of Appeal, that Mr Baxter took the 7.24 draft announcement to the February board meeting, it is

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62 (2009) 256 ALR 199 at 240 [197].

63 (2009) 256 ALR 199 at 242 [208]-[210].

64 (2009) 256 ALR 199 at 242 [209]; (2010) 274 ALR 205 at 280 [378]-[379].

65 (2010) 274 ALR 205 at 281 [383].

66 (2010) 274 ALR 205 at 279 [375].

not readily to be supposed, in the light of its production by Allens and BIL, that Mr Baxter kept the document with his other papers and did not distribute it to those who attended the meeting. The primary judge was right to hold that the 7.24 draft announcement was distributed at the meeting.

80 Two further drafts of the ASX announcement were made: one at about 9.35 am on 15 February (after the board meeting had started at 9.00 am) and the other at about 7.42 pm on that day. Subject to one qualification, the final ASX announcement was substantially in the form of this last draft. The qualification that must be made is that the final announcement said that the MRCF would commence operations with assets of $293 million; the draft created at 7.42 pm had said $285 million. Such other differences as there were between the last draft and the final announcement are immaterial.

81 The Court of Appeal concluded[67] that some of the differences between the 7.24 draft announcement and the draft produced at 7.42 pm were "unexceptional". Others, the Court of Appeal said[68], were of "more significance", an expression which, in the context in which it was used, must be understood as referring to the significance the Court attributed to the changes in determining whether the 7.24 draft announcement had been tabled and approved, not as referring to any question about what representations the 7.24 draft announcement or the final ASX announcement conveyed.

82 The changes that were made to the body of the 7.24 draft announcement to arrive at the final ASX announcement are most easily identified by reproducing its text, striking through the deletions and underlining what was inserted:

> "James Hardie Industries Limited (JHIL) announced today that it had established a foundation to compensate sufferers of asbestos-related diseases with claims against <u>two former James Hardie subsidiaries</u>~~the company~~ and fund medical research aimed at finding cures for these diseases.
>
> The Medical Research and Compensation Foundation (<u>MRCF</u>~~Foundation~~), to be chaired by Sir Llewellyn Edwards, will be

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67 (2010) 274 ALR 205 at 271 [321].

68 (2010) 274 ALR 205 at 271 [321].

completely independent of JHIL and will commence operation with assets of $293~~284~~ million.

The Foundation has~~will have~~ sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL.

JHIL CEO~~,~~ Mr Peter Macdonald said that the establishment of a fully-funded Foundation provided certainty for both claimants and shareholders~~the best resolution for all stakeholders~~.

'The establishment of the Medical Research and Compensation Foundation provides certainty for people with a legitimate claim against the former James Hardie companies which manufactured asbestos products,' Mr Macdonald said.

'The Foundation will concentrate on managing its substantial assets for the benefit of claimants. Its establishment has effectively resolved James Hardie's asbestos liability and this will allow management to focus entirely on growing the company~~solely on asbestos for the benefit of claimants allowing James Hardie to pursue its very exciting growth prospects~~ for the benefit of all shareholders.'

A separate fund of $3 million has also been granted to the Foundation~~set aside~~ for scientific and medical research aimed at finding treatments and cures for asbestos diseases.

The $293~~284~~ million assets of~~vested into~~ the Foundation include~~s~~ a portfolio~~s~~ of long term securities~~commonly traded shares~~, a substantial cash reserve, properties which earn rent and insurance policies which cover various types of claims, including all workers compensation claims.

~~Fund manager,~~ Towers Perrin has been appointed to advise the Foundation on its~~manage the Foundation's~~ investments, which will generate investment income and capital growth.

In establishing the Foundation, James Hardie sought expert advice from a number of firms, including ~~actuaries Trowbridge, Access Economics and~~ PricewaterhouseCoopers, Access Economics and the actuarial firm, Trowbridge. With t~~T~~his advice, supplementing~~ed~~ the company's long experience in the area of asbestos, the directors of JHIL~~and formed the~~

basis of determined~~ing~~ the level of funding required by the Foundation~~to meet all future claims~~.

'~~The directors of~~ James Hardie is~~are~~ satisfied that the Foundation has~~will have~~ sufficient funds to meet anticipated~~all~~ future claims,' Mr Macdonald said.

The initial $3 million for medical research will enable the Foundation to continue work on existing programs established by James Hardie as well as launch new programs.

When all future claims have been concluded, ~~the Foundation will convert any remaining assets to cash and these~~ surplus funds will be used to support further~~donated to a reputable medical and or~~ scientific and medical research ~~organisation involved in work~~ on lung diseases.

Mr Macdonald said~~,~~ Sir Llewellyn Edwards, who has~~d~~ resigned as a director of James Hardie Industries Limited to take up his new appointment as chairman of the Foundation, has enjoyed a long and distinguished career in medicine, politics and business. His experience with James Hardie will assist the Foundation to rapidly acquire the knowledge it needs to perform effectively. Sir Llew~~He~~ is a director of a number of organis~~z~~ations including Westpac Banking Corporation and is also Chancellor of the University of Queensland.[69]

The other Foundation directors are~~include~~ Mr Michael Gill, Mr Peter Jollie and Mr Dennis Cooper."

83 Who made these changes was not explored by the primary judge[70]. The Court of Appeal observed[71] that the changes were "largely unexplained". The Court of Appeal referred[72] to Mr Baxter's evidence in chief that he recalled that

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69 The last two sentences appeared as a separate paragraph in the final ASX announcement.

70 (2009) 256 ALR 199 at 226-230 [112]-[122].

71 (2010) 274 ALR 205 at 270 [317].

72 (2010) 274 ALR 205 at 275 [352].

Mr Robb and he discussed making changes to "the draft JHIL media release" and that he "usually made the changes that [Mr Robb] recommended", but the Court of Appeal made no particular findings[73] about who proposed or made the changes. Argument in this Court proceeded on the footing that the changes were made by the management of JHIL without reference to the board and that at least some of the changes may have been suggested by either Mr Peter Cameron or Mr Robb of Allens. The respondents' submissions in this Court, as at trial and in the Court of Appeal, emphasised the fact that changes were made. That is, as the Court of Appeal noted[74], the respondents submitted that:

> "the evidence of the conduct of management and Allens after the meeting, including changes to the draft ASX announcement, were inconsistent with ASIC's case that an unqualified and unconditional resolution was passed at the February meeting. …
>
> ASIC did not allege some kind of approval in principle, leaving open later change."

84 It is enough for present purposes to deal directly with only five of the changes that were made to the text of the 7.24 draft announcement.

85 Reference was made in the second and eighth paragraphs of the announcement to the value of the assets of the MRCF. The value stated was changed from $284 million to $293 million. The Court of Appeal said[75] that this was "not a minor matter".

86 In the third and eleventh paragraphs, the word "anticipated" was introduced. So, the third paragraph of the announcement was changed[76] as follows:

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73 (2010) 274 ALR 205 at 271-273 [318]-[337].

74 (2010) 274 ALR 205 at 271 [319]-[320].

75 (2010) 274 ALR 205 at 271 [323].

76 cf (2010) 274 ALR 205 at 271 [324].

> "The Foundation has~~will have~~ sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL."

The fourth paragraph was changed[77] as follows:

> "JHIL CEO~~,~~ Mr Peter Macdonald said that the establishment of a fully-funded Foundation provided certainty for both claimants and shareholders~~the best resolution for all stakeholders.~~."

The tenth paragraph, dealing with advice provided by Trowbridge, Access Economics and PricewaterhouseCoopers, was changed[78] as follows:

> "With t~~T~~his advice, supplementing~~ed~~ the company's long experience in the area of asbestos, the directors of JHIL~~and formed the basis of~~ determine~~d~~ing the level of funding required by the Foundation~~to meet all future claims~~."

And the eleventh paragraph was changed[79] as follows:

> "'~~The directors of~~ James Hardie is~~are~~ satisfied that the Foundation has~~will have~~ sufficient funds to meet anticipated~~all~~ future claims,' Mr Macdonald said."

87 The Court of Appeal was of the view[80] that "the subsequent changes detract from *an inference* that the board passed the draft ASX announcement resolution" (emphasis added). And the Court of Appeal concluded[81] that the changes which have just been described were "significant" because their making:

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77 cf (2010) 274 ALR 205 at 271 [326].

78 cf (2010) 274 ALR 205 at 272 [329].

79 cf (2010) 274 ALR 205 at 272 [331].

80 (2010) 274 ALR 205 at 271 [320].

81 (2010) 274 ALR 205 at 272 [336].

> "suggests that making them was thought to be open despite whatever had occurred at the meeting, and thus that whatever had occurred at the meeting was less than the draft ASX announcement resolution. If a draft news release was before the board, the board did not give it final sign off as an important announcement according to the process described by Mr Baxter, but the final terms of the news release and ASX announcement were left to management."

88 Taken as a whole, the amendments made to the 7.24 draft announcement are properly described as textual rather than substantive. If particular attention is given to the changes that have been described, none of them altered the sense of what was being said in the document as a whole. And no party argued in this Court that the primary judge was wrong to conclude, as he did[82], that the 7.24 draft announcement and the final ASX announcement conveyed identical misrepresentations.

89 As the primary judge found[83], the change in value for the assets of the MRCF was made by the financial controller of JHIL to make the announcement accord with the figure that would be recorded as an extraordinary loss in JHIL's books of account. Understood in this light the change is unremarkable.

90 As for the other changes that have been specially mentioned, only two particular points need be made beyond the general observation that the changes were textual and not substantive. First, although some emphasis was given in argument and in the reasons of the Court of Appeal[84] to the insertion of the word "anticipated" in the third and eleventh paragraphs, that change followed from changing those paragraphs to refer to the funds the MRCF *had* rather than the funds that it *would have*. The insertion of the word "anticipated" was entirely consistent with, and did not alter the sense of, what had been said in the 7.24 draft announcement. Second, contrary to the view expressed[85] by the Court of Appeal, the changes made to the announcement did not move "[t]he focus of the determination of the level of funding … from the advisers to the directors".

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82 (2009) 259 ALR 116 at 189-190 [472], declarations 1 and 4.

83 (2009) 256 ALR 199 at 380 [1208].

84 (2010) 274 ALR 205 at 271-272 [324]-[325], [331]-[332].

85 (2010) 274 ALR 205 at 272 [330].

91 The respondents pointed to some other considerations which they submitted supported the conclusion that the board did not, as ASIC had alleged, approve the 7.24 draft announcement.

92 Mr Baxter gave evidence that significant ASX announcements, like the announcement in issue in these matters, would usually be considered by the board but that, before being sent to the board, a draft announcement usually required "the approval of the CEO, the CFO, General Counsel, and the company's external legal advisers"[86]. In this case, none of Mr Macdonald, Mr Morley (the chief financial officer) or Mr Shafron had seen the 7.24 draft announcement before the February board meeting began. Nor had Allens seen or approved the draft before the meeting. Reference was made in this respect to a written policy adopted by JHIL as governing announcements by the company. The steps which Mr Baxter said would usually be followed were steps that were consistent with the written policy. The respondents submitted that it was improbable, both in the light of this policy and more generally, that Mr Baxter would have shown the board an incomplete and insufficiently developed document.

93 In addition to these departures from the ordinary procedures followed in relation to ASX announcements, Mr Baxter gave evidence that, if reference was to be made in an announcement to third parties such as Trowbridge, PricewaterhouseCoopers and Access Economics, as was proposed in the 7.24 draft announcement, the consent of those third parties to what was to be said about them would be sought before the announcement was made. Consent was not sought from any of these third parties until the afternoon of 15 February 2001, after the board meeting had finished. Mr Shafron sought consent from Trowbridge in an email he sent at 8.12 on the evening of 15 February 2001. In his email he said that "[t]he wording we *propose* in the press release simply says that James Hardie got advice from Trowbridge" and that "[a]s of the moment the document is not available for me to attach" (emphasis added). The respondents submitted that these events and statements pointed to the board not having approved any particular text of a proposed announcement.

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86 (2010) 274 ALR 205 at 268 [303].

94 Two other points made by the respondents about the alterations to the 7.24 draft announcement should be examined at this point but may then be dismissed from further consideration.

95 Some of the respondents sought to recast a point which they had lost at trial and upon which the Court of Appeal did not rely. At trial, Mr Morley gave evidence that he had seen Mr Robb write the word "anticipated" on a form of press release in the early hours of 16 February when Mr Morley was working in Mr Robb's office on the proposed Deed of Covenant and Indemnity. At trial, the respondents submitted[87] that this evidence, taken with other matters, prevented the primary judge from finding that, as ASIC had alleged, Mr Baxter took the 7.24 draft announcement to the February board meeting. The primary judge found[88] that Mr Morley "was mistaken as to the timing of this event" and rejected[89] the respondents' argument. (As noted earlier, both the primary judge and the Court of Appeal found that Mr Baxter took the 7.24 draft announcement to the board meeting.)

96 In this Court, some of the respondents submitted that Mr Morley's evidence of Mr Robb's annotating a press release (coupled with Mr Morley's lack of reaction to that being done) was inconsistent with the board having approved the draft announcement. Mr Robb considered himself to be free to change the draft and Mr Morley did not think that, in doing that, Mr Robb was acting inconsistently with the board's decision. But recast in this way, the argument was no more than a particular example given in support of the more general proposition that the making of changes to the announcement was inconsistent with its having been approved. Mr Morley's evidence in this respect (even if accepted) did not advance the respondents' case.

97 The respondents also referred to a statement which Mr Peter Cameron of Allens had given to the Special Commission of Inquiry into the Medical Research and Compensation Foundation established by the New South Wales Government in February 2004. What was said in that statement, if accepted, would demonstrate that before the February board meeting began Mr Cameron

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87 (2009) 256 ALR 199 at 240-243 [198]-[218].

88 (2009) 256 ALR 199 at 243 [218].

89 (2009) 256 ALR 199 at 241 [200], 243 [219].

and Mr Robb spoke by telephone with Mr Macdonald and Mr Shafron about the accuracy of the claims data which underpinned the Trowbridge actuarial report. The respondents submitted, and the Court of Appeal accepted[90], that, as a result of the conversation, Mr Cameron and Mr Robb "must" have gone into the board meeting uncertain of whether the reports upon which the board was being asked to act (or at least the report from Trowbridge) provided a sound footing for decision about the separation proposal. The respondents submitted that it followed that it was "most unlikely" that Mr Cameron or Mr Robb would have allowed the meeting to approve the 7.24 draft announcement without one of them interrupting proceedings and pointing out that he (or they) entertained these uncertainties.

98 The respondents pointed to that part of Mr Cameron's statement in which he said that he had told Mr Macdonald and Mr Shafron:

> "With the Board meeting so soon, I am simply not in a position to absorb and assess the detail of what has happened."

But as the Court of Appeal recorded[91], Mr Cameron's account of his conversation continued. According to Mr Cameron, he continued by saying to Mr Macdonald and Mr Shafron:

> "My primary concern is whether this information has any impact on the key conclusions in the proposals going to the Board and the financial models which are based on the Trowbridge report. In short, I need to understand the bottom line before we talk to the Board. *Is there any reason to depart from the view that the Foundation will be fully funded?*" (emphasis added)

Mr Cameron stated that Mr Macdonald replied: "Absolutely not." And as the Court of Appeal also recorded[92], a file note taken by Mr Robb of this conversation included, at the end:

> "PC [Mr Cameron] — had been concerned to confirm position

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90 (2010) 274 ALR 205 at 274 [343].

91 (2010) 274 ALR 205 at 274 [341].

92 (2010) 274 ALR 205 at 274 [342].

PMac [Mr Macdonald] — they are the most recent full set of numbers — last quarter is higher

PC — *no reason to depart from view that fully funded?*

PMac — *yes that is the case*." (emphasis added)

99 Far from requiring the conclusion that the representatives of Allens entered the board meeting uncertain about whether the Trowbridge report supported an assertion that the MRCF would be "fully funded", the evidence of Mr Cameron's statement pointed firmly towards the conclusion that Messrs Cameron and Robb had been assured by Mr Macdonald, in the hearing of Mr Shafron, that the report did support what was said both in the 7.24 draft announcement and the final ASX announcement about the MRCF being "fully funded". The Court of Appeal was wrong to conclude that Messrs Cameron and Robb "*must* have gone to the meeting uncertain about whether … a surplus was the most likely outcome"[93] (emphasis added). This evidence did not establish the premise for the respondents' submission that Mr Cameron or Mr Robb would not have allowed the board to approve the 7.24 draft announcement without one of them interrupting the meeting. Nor did this evidence support the more general proposition advanced by the respondents that the alterations made to the 7.24 draft announcement showed that that announcement was neither tabled nor approved at the board meeting.

100 Four points may then be made about the respondents' arguments based on the alterations that were made to the 7.24 draft announcement.

101 First, the emphasis that the respondents gave to the way in which ASIC pleaded its case must be assessed in the light of why ASIC put its case in the way it did. ASIC pleaded its case as hinging about the board's approval of the 7.24 draft announcement because: first, the board's own minutes said that the board had approved a draft announcement; second, Mr Baxter said he took the 7.24 draft announcement to the meeting; and third, the production of copies of a draft announcement in the form of the 7.24 draft announcement by Allens and BIL showed that the 7.24 draft announcement had been distributed at the meeting. That is, ASIC pleaded its case in the way it did because that was what ASIC said the documentary records showed had occurred.

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93 (2010) 274 ALR 205 at 274 [343].

102 The second point to make about the respondents' arguments based on the alterations that were made to the 7.24 draft announcement is that the significance to be given to JHIL's usual practices for approving important draft ASX announcements not being completed before the February board meeting must be assessed against the speed with which events unfolded in February.

103 The board had been told in both its January and February board papers that, if the separation was to be effected, it was best to announce the decision at the same time as JHIL's third quarter financial results were announced on 16 February 2001. The final details of the separation proposal were not set out in the February board papers, distributed on about 7 February. The final details of the separation proposal were described only in the slide presentation made to the board in the course of the February meeting. A draft ASX announcement was included in the board's papers for the January meeting but none was included with the board's February meeting papers. The announcement sent in January related to the net assets model for funding the MRCF and that model was rejected at the January meeting. It was plain to all concerned that, if the separation proposal was approved at the February board meeting, for announcement on the following day, there would have to be an ASX announcement made immediately. Yet a draft announcement for the February proposal was not prepared until 14 February. And it was that draft, as amended by Mr Baxter at 7.24 on the morning of 15 February, that was taken to the board meeting. All this being so, the failure to follow normal procedures for preparing ASX announcements was unsurprising and, contrary to the respondents' submissions, did not support the conclusion that the 7.24 draft announcement was not tabled and approved.

104 Third, ASIC alleged and the primary judge found[94] that the 7.24 draft announcement and the final ASX announcement made the same misrepresentations. The correctness of that finding was not in issue in the proceedings in this Court. As has been shown, when read in the context of the whole announcement none of the alterations that were made to the text was substantial. That is, as ASIC alleged in its pleading, the 7.24 draft announcement and the final ASX announcement "were not materially different".

105 Fourth, the argument that management (with or without the participation of Allens) would not have altered the 7.24 draft announcement as they did, if the

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94 (2009) 256 ALR 199 at 298-299 [615]-[622].

board had approved it, proceeded from one of two alternative premises. Either the argument proceeded from the premise that board approval fixed every last element of the text of the announcement immovably, so that any alteration made by management or Allens showed that the board had not approved the announcement, or it proceeded from the premise that the changes made were of a kind that could not properly have been made and for that reason would not have been made if the board had approved the announcement. Neither premise should be accepted.

106 The first form of premise (described in argument by saying that the announcement had been "set in stone") would entail that any alteration, however inconsequential, to the text of the 7.24 draft announcement was unauthorised. The minutes of the February meeting also recorded that the Deed of Covenant and Indemnity (referred to in the minutes as the "Deed of Indemnity") had been tabled and that the board had resolved that it be executed. Yet the evidence of Mr Morley, relied on by the respondents for other purposes, about his working at Mr Robb's office on amendments to that deed after the board meeting would, by the same reasoning, require the conclusion that the deed was neither tabled nor approved for execution at the meeting.

107 The first of the alternative premises for the respondents' arguments about the significance to be attached to the alterations that were made to the 7.24 draft announcement should not be accepted. The proposition takes its force from the content that it seeks to give to the idea of "approval" by the board – content that is sufficiently conveyed by the metaphor of "set in stone". To understand approval by the board as having that meaning would give the notion a rigidity which it does not have. Whether a deed that is later executed or an announcement that is later published is the document which the board approved must be determined by more than a literal comparison between texts. Slips and errors can be corrected. In at least some cases better (but different) wording can be adopted. The rigid rule which underpinned the respondents' submissions should not be accepted. The bare fact that alterations were later made does not demonstrate that the document was not approved by the board. Nor does that fact demonstrate that what was sent to the ASX was not the document which the board resolved was approved and was to be sent. Account must be taken of what alterations were made and the circumstances in which they were made.

108 As for the second of the alternative premises, its validity depends upon combining two considerations – the identification of some changes as changes that "could not properly have been made" and the proposition that *because* they *could* not properly have been made after approval, they would likely not have

been made if approval had been given. The criterion by which some changes would be classified as changes that could not properly be made was not identified in argument. Assuming, however, that some criterion or criteria could be formulated for that purpose, the second element of the premise (that therefore the changes would not have been made if approval had been given) presupposes that it would have been evident to those making the changes that they had gone beyond what the board had approved. When, as was accepted to be the case here, the changes that were made did not alter the misrepresentations that were made in the 7.24 draft announcement, it is not to be supposed that those who made the changes would recognise that they had gone beyond proper bounds – for it was not shown that the changes that were made altered in any material way the substance of the announcement that the board had approved. And even if that were not so, the making of the changes would show no more than that those who made them had no authority to do so; their making the changes would not, and in this case did not, show that the 7.24 draft announcement had not been approved.

109 The four points that have been made about the respondents' arguments based on the alterations to the 7.24 draft announcement respond to the arguments advanced by the parties in this Court and the matters that arise from the reasons of the primary judge and the Court of Appeal. There is, however, a further point to be made which was not mentioned by any party in argument in this Court and was not dealt with in the reasons of either the primary judge or the Court of Appeal. It concerns the authority Mr Macdonald and certain others were given to alter documents relating to the separation proposal.

110 The minutes of the February board meeting recorded the tabling of a power of attorney which appointed Mr Macdonald and others, severally, as attorneys for JHIL "to execute, exchange and deliver all documents in connection with constituting the Foundation". The minutes recorded that the board resolved "to execute the Power of Attorney". A power of attorney dated 15 February 2001, executed as a deed poll by JHIL (by the chairman, Mr McGregor, and one of the company secretaries, Mr Donald Cameron) and tendered in evidence at the trial, gave the attorneys very wide powers. Those powers included power to "[c]omplete any blanks in, *supplement or amend* any Document" (a term defined in the power as including "Australian Stock Exchange Announcements") (emphasis added). On the face of it, this document presents a further very considerable, even insurmountable, obstacle in the way of accepting those arguments of the respondents that depended upon the making of changes to the 7.24 draft announcement. The minutes, and the power of attorney, read together, appear to demonstrate that the board gave Mr Macdonald power to alter the draft

ASX announcement. But the point not having been explored in argument, nothing more need be said about it.

The inaccuracies in the minutes

111 It was not disputed in this Court that the minutes of the February board meeting did not record all events at the meeting in the order in which they happened. So, for example, the minutes referred to one of the non-executive directors of JHIL, Sir Llewellyn Edwards, leaving the meeting before the execution of certain documents was noted when, in fact, he left the meeting at a later time. Nor was it disputed in this Court that there were other errors in the minutes. The minutes recorded that the directors noted a substantial shareholders notice but the minutes gave the wrong date for that notice. And the primary judge found[95] that the minutes were wrong when they recorded, as they did, that the board had "approved Mr Macdonald continuing to explore strategic options for the Gypsum business". As part of the slide presentation made to the board at its February meeting in connection with consideration of the separation proposal, one action sought from the board was described as approval of "commencement of the sale process to *test* value of gypsum (*sale subject to Board approval* if acceptable bids are received)" (emphasis added). The particular recommendation made to the board might well be thought to be sufficiently captured by the more general description given in the minutes but it is not necessary, for present purposes, to go beyond noticing that the relevant minute differed from the recommendation put to the board.

112 The primary judge also found[96] that the minutes were erroneous in not recording another of the actions that had been described in the slides put to the board at its February meeting: "Continue to progress restructuring preparation for Board approval in May". Given that the action spoken of in the slide was action to be undertaken by the management of JHIL, and not its board, and given further that the slide did not explicitly seek board approval for undertaking this work, it is greatly to be doubted that the minutes are properly to be seen as inaccurate because no record was made of this matter. But again, it is sufficient to observe that the minutes differed from the material put before the board in this respect.

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95 (2009) 256 ALR 199 at 380 [1218].

96 (2009) 256 ALR 199 at 380 [1219].

113 None of these inaccuracies bears directly upon whether the 7.24 draft announcement was tabled and approved at the meeting.

114 The minutes relating to the separation of Coy and Jsekarb from JHIL, set out under the heading "Creation of Foundation", recorded the tabling of 15 different documents and the passing of 17 separate resolutions. The minutes relating to the separation were by far the largest section of the February board minutes: they occupied more than five of the eight pages of minutes.

115 There were said to be three demonstrable errors in the minutes relating to the separation. In two places the amount that JHIL would contribute to the MRCF pursuant to the terms of the Deed of Covenant and Indemnity granted by Coy and Jsekarb to JHIL was said to be "A$65 million net present value", whereas slides presented at the board meeting showed that the amount that was to be paid by JHIL would have a net present value of $72 million. The Court of Appeal described[97] this as "a significant inaccuracy".

116 The third error was to record that the chairman tabled a power of attorney (as has been mentioned) appointing, among others, Mr Guy Jarvi as an attorney for JHIL "to execute, exchange and deliver all documents in connection with constituting the Foundation". Mr Jarvi was not appointed as an attorney in the tabled power. But the primary judge found[98] that "[t]he matter was rectified at the April 2001 board meeting".

The significance of inaccuracies in the minutes

117 The respondents submitted in this Court, in effect, that demonstration of any important error in the minutes cast doubt upon their accuracy in recording that a draft ASX announcement was tabled and approved. The respondents submitted that taken together the errors in and omissions from the minutes meant that their probative value was minimal. The respondents also submitted that the minutes were drafted before the February board meeting and for that reason

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97 (2010) 274 ALR 205 at 300 [492].

98 (2009) 256 ALR 199 at 380 [1210].

should not be treated as an accurate record of what happened at the meeting. Both of these arguments were accepted[99] by the Court of Appeal.

118 Although the Court of Appeal regarded[100] the "reliability" of the minutes of the February meeting as "very much open to question", the fact that some parts of the minutes were inaccurate does not *necessarily* imply that other parts of the minutes (in particular the minute that recorded the tabling and approval of a draft ASX announcement) were inaccurate. And similarly, the fact that the minutes were drafted before the meeting does not *necessarily* imply that they did not accurately record what happened at the meeting.

119 The submission which the Court of Appeal accepted[101], that "the minutes were drafted before the meeting, and were not a true record of what had occurred at the meeting *because* they had been drafted before the meeting" (emphasis added), depended for its force upon an unstated premise: that the draft prepared before the meeting was not considered after the meeting. But that premise was not right.

120 As the Court of Appeal recorded[102], Mr Robb had sent Mr Shafron draft minutes of the meeting on the morning of 15 February 2001 at 8.05 am. On 21 March 2001, Mr Shafron sent, by email, a modified version of the draft minutes to Messrs Macdonald and Morley. The Court of Appeal correctly observed[103] that this modified version of the minutes included, for the first time, "the matters other than the establishment of the [MRCF]" and "took up much" of the draft Mr Robb had sent on 15 February. But the draft which Mr Shafron sent to Messrs Macdonald and Morley did not take up *all* of Mr Robb's draft. A comparison of the drafts of 15 February and 21 March reveals that there were, as ASIC submitted, a number of substantive changes made to that part of the 15 February draft that dealt with the separation. Resolutions were removed and the order of some resolutions was changed. The heading to the minute about the

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99 (2010) 274 ALR 205 at 301 [494]-[497].

100 (2010) 274 ALR 205 at 301 [497].

101 (2010) 274 ALR 205 at 301 [494].

102 (2010) 274 ALR 205 at 297 [477].

103 (2010) 274 ALR 205 at 297 [479].

draft announcement was altered and "Chair" was changed to "Chairman" in the text of the recital to the resolution. Other stylistic and typographical changes were made in other parts of the minutes dealing with the separation. Thus, the premise implicit in the Court of Appeal's reasoning, that the minutes did not receive attention after the February board meeting, and therefore necessarily did not reflect what happened at that meeting, is not to be accepted.

121 In any event, the time at which the minutes were drafted must not be permitted to obscure the significance of the decision, in April, to adopt them as a correct record, a matter to which the Court of Appeal gave little weight. As the Court of Appeal correctly found[104], "the resolution in the ASX announcement minute was fairly prominent". Yet despite this, the directors approved the February minutes as a correct record and those who gave evidence at the trial were left to explain this by saying only (in one case) that he never read board minutes and (in the other cases) that the director concerned had not read them with sufficient care. All this being so, the Court of Appeal identified no sufficient reason for concluding, as it did[105], that only "[s]ome strength in ASIC's case [lay] in the minutes of the February meeting and their adoption at the April meeting".

122 The primary judge also held that two other parts of the evidence pointed to the conclusion that the board had approved the 7.24 draft announcement at its February board meeting. First, as ASIC emphasised in this Court, there was the so-called "correlation evidence" given by Mr Brown[106]. Second, there was the complete absence of any evidence of protest after the event, by any member of the board, about the announcement that JHIL in fact made to the ASX[107]. Something should be said about both subjects.

Mr Brown and the "correlation evidence"

123 Eight persons who had attended the 15 February board meeting (Ms Hellicar and Messrs Baxter, Harman, Brown, Gillfillan, Koffel, Willcox and

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104 (2010) 274 ALR 205 at 301 [496].

105 (2010) 274 ALR 205 at 349 [791].

106 (2009) 256 ALR 199 at 234-235 [153]-[161].

107 (2009) 256 ALR 199 at 374-376 [1152]-[1165].

Morley) gave evidence at the trial. None professed to have any specific recollection of a draft announcement being tabled or of an announcement being approved. Some, but not all, of those witnesses recalled discussion about the company's "communications strategy". And it is to be borne in mind that the board papers for both the January and the February meetings had given this subject extended and prominent treatment.

124 Mr Brown said that he believed "there was significant discussion about the communication of the Foundation to all outside parties" and that "there was … a discussion … of the key messages that were to be provided to the market". (One of the slides presented at the meeting was headed "Summary of key issues for consideration" and referred to "Positioning/key stakeholder messages".) In the course of cross-examination by counsel for ASIC, Mr Brown accepted, among other things, that following the January board meeting, "if the management was going to put up a proposal again, there were two things that [he] expected of them: one, it would be fully funded … [a]nd, two, that's the message they would be conveying to the market". Mr Brown said that "there was a whole lot of discussion in the board meeting" about the "communications strategy", "and that was the focus of the board meeting, for the board to be satisfied that the Foundation had sufficient funds to meet its obligations".

125 Mr Brown described, in his evidence in chief, an exchange he had had with Mr Macdonald during the February board meeting about the sufficiency of funding for the MRCF. The primary judge said[108] that:

> "Mr Brown's evidence was that he asked Mr Macdonald at the 15 February 2001 meeting: 'Can we be sure that the funds we allocate to the Foundation on the basis of the Trowbridge report are sufficient? Is the Trowbridge report sound and fit for purpose?'.
>
> Mr Brown said that Mr Macdonald replied: 'If we can't tell all of the interested stakeholders that there will be enough funds then we will have great difficulty getting acceptance of the plan and it won't work'. Mr Brown accepted that was a statement about the content of the announcement to the ASX.

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108 (2009) 256 ALR 199 at 234 [148]-[151].

> Mr Brown said he responded: 'I appreciate that difficulty, but that is not an answer. My question is: *are you sure there are going to be sufficient funds in the trust?*' To which Mr Macdonald said: '*Yes there are*. We have got the best actuarial modelling. We have shown that we can meet the cash requirements each year. *We are providing enough funds for future claims*'.
>
> Mr Brown said that no one else at the meeting said anything to qualify what Mr Macdonald had said." (emphasis added)

126 Mr Brown also gave evidence at the trial explaining how the term "fully funded" had come to be used in the course of the February board meeting. He said:

> "I believe that at probably the January but certainly the February meeting, the concept was that the board was looking at and it was being proposed to the board that the actuarial estimate provided sufficient funds. That's a longwinded way of expressing something. I believe that the shorthand way that was developed in that meeting was to say it was fully funded, but fully funded in the context of sufficiently funded to the actuarial estimate".

127 Based on his consideration of the evidence given, not only by Mr Brown but also by others who attended the February board meeting, the primary judge concluded[109]:

> "that one or other or both of Mr Macdonald and Mr Baxter spoke to the draft ASX announcement and put the statements as to the key message to be communicated to the market set out in that document that Mr Brown agreed were likely to have been stated and, to lesser extent, Mr Koffel agreed might have been stated."

128 The Court of Appeal, however, concluded[110] that the primary judge's reasoning on this aspect of the matter had proceeded by four steps:

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109 (2009) 256 ALR 199 at 244 [223].

110 (2010) 274 ALR 205 at 286 [401].

(a) the draft announcement (which the Court of Appeal referred to as a "draft news release") "contained a number of statements";

(b) Mr Brown recalled management (Mr Macdonald or Mr Baxter) "voicing statements in the terms of those in the draft news release at the February meeting";

(c) "the *only* source for the statements was the draft news release" (emphasis added); and

(d) "it should be inferred that management voiced the statements from the draft news release".

129 The Court of Appeal determined[111] that it was in a position to decide for itself whether the evidence given by Mr Brown amounted to no more than his acceptance that it was possible that a number of matters had been put by management as key messages to be conveyed to the market and to others. The Court of Appeal further concluded[112]: "We do not think that recollection lay behind Mr Brown's answers involving likelihood, nor was a basis laid for reconstruction."

130 It may be doubted that the latter conclusion by the Court of Appeal gave sufficient weight to the advantages the primary judge had in assessing the effect of Mr Brown's evidence[113], but it is not necessary to decide whether that is so. Rather, attention should be directed to the Court of Appeal's further conclusions[114] that, having regard to what was said in the slides presented to the board at the February meeting, "[t]he correlation with the draft news release seen by the judge is in our view weak" and that "acceptance by the board that a strong assurance of sufficiency of funding should be given does not satisfy the pleaded case of the specific draft ASX announcement resolution".

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111 (2010) 274 ALR 205 at 286 [408].

112 (2010) 274 ALR 205 at 287 [409].

113 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23]; [2003] HCA 22.

114 (2010) 274 ALR 205 at 288-289 [420]-[421].

131 It may readily be accepted that what was said by Mr Macdonald in his exchange with Mr Brown, what was said on the slides that were shown to the board at its February meeting, and what was said in the 7.24 draft announcement about the sufficiency of funding to be provided to the MRCF were not materially different. Indeed, any real difference between what the board was told by Mr Macdonald in response to Mr Brown's questions, what the board was told in the slides and what was said in the 7.24 draft announcement (repeated to no materially different effect in the final ASX announcement) may well have engendered some doubt about whether the 7.24 draft announcement was tabled at the board meeting. But the substantial identity of all of this material was not inconsistent with the tabling and approval of the 7.24 draft announcement. And the conclusion which the primary judge had reached (that Mr Macdonald or Mr Baxter, or both, had probably spoken to the draft announcement) on the basis of the "correlation evidence" was not shown to be unfounded by pointing to the fact that the board was told the same things in several different ways. None of what Mr Brown said was inconsistent with the minutes accurately recording that a draft ASX announcement was tabled and approved.

132 If, as the Court of Appeal concluded, Mr Brown's evidence was not founded on recollection and proceeded from no established basis for reconstruction, the Court of Appeal was right to conclude that his evidence would of itself not have proved that an announcement was tabled and approved. But the minutes were themselves evidence of those facts. The critical observation to make about Mr Brown's evidence is that it did not deny that the minutes were accurate.

Absence of later protest

133 ASIC led evidence at trial which it said showed that, after JHIL sent the final ASX announcement to the ASX, the directors were sent copies of it but made no protest about its terms. ASIC submitted that the absence of protest supported its case.

134 Although little reference was made to this evidence in the course of the proceedings in this Court, the Court of Appeal noted[115] that the primary judge found[116] that the personal assistant to Mr Donald Cameron (one of JHIL's

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115 (2010) 274 ALR 205 at 302 [501].

116 (2009) 256 ALR 199 at 376-377 [1166]-[1178].

company secretaries) arranged a telephone conference on 20 February 2001 for "interested Directors" to "hear a report on the aftermath of the separation announcement". Those directors who gave evidence at the trial denied any recollection of such a telephone conference being arranged or held. But the primary judge found[117], contrary to those denials, that a telephone conference, in which at least Ms Hellicar participated, was held. The primary judge also found[118] that copies of the final ASX announcement were sent to the non-executive directors.

135 There was no evidence that at any time during 2001 any director or officer of JHIL protested about the terms in which JHIL made its announcement to the ASX on 16 February 2001. The Court of Appeal concluded[119] that to reason from the directors' failure to complain about the terms in which the announcement was made to a conclusion that the directors had approved the draft ASX announcement, by reference to the finding the primary judge had already made that the announcement had been approved, was circular.

136 If that was the reasoning that was adopted by the primary judge, the criticism was open. But the better view is that the primary judge reasoned that the absence of complaint about the terms of the final ASX announcement was not consistent with the hypothesis advanced by the directors: that there was no approval and that there would not have been if the 7.24 draft announcement had been tabled. For underpinning much of the argument advanced on behalf of the respondents at trial, on appeal to the Court of Appeal and in this Court, was a proposition which, though never expressed in these terms, amounted to saying that, if asked, the directors would never have approved the 7.24 draft announcement because the announcement was evidently misleading. If that were right, why would the directors not have challenged management about what was said in the final ASX announcement? The final ASX announcement was not to any materially different effect from the 7.24 draft announcement. The Court of Appeal was, therefore, wrong to conclude[120] that the absence of protest might suggest that the 7.24 draft announcement had *not* been approved because, if it

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117 (2009) 256 ALR 199 at 377 [1178].

118 (2009) 256 ALR 199 at 374 [1152]-[1153], 376 [1165].

119 (2010) 274 ALR 205 at 302 [502].

120 (2010) 274 ALR 205 at 293 [445].

had, the differences between that draft and the final ASX announcement would have provoked directors to protest. Rather, absence of protest about the terms of the final ASX announcement was consistent with the board having approved the 7.24 draft announcement at the February meeting. It may also have been consistent with the directors not having read the final ASX announcement and with their not having been able or sufficiently interested to participate in the proposed telephone conference. But absence of protest was important to assessing whether, as the directors asserted, they, if asked, would not have approved the 7.24 draft announcement.

137 The evidence about opportunity for but absence of protest about the final ASX announcement supported ASIC's case; at the very least, it did not show the minutes to be false.

138 The contrary conclusions reached by the Court of Appeal point to the fundamental difficulty in the Court's reasoning that has already been identified. Although, as noted earlier, the Court of Appeal recognised[121] that this was "not wholly a case of circumstantial evidence", much of the analysis of the evidence undertaken by the Court of Appeal treated the minutes as no more than one circumstance from which ASIC sought to have the Court draw an *inference* that a draft announcement was tabled and approved. But the minutes were more than just one of several pieces of evidence from whose united force ASIC sought to have the tribunal of fact draw an inference. The minutes were a formal and near contemporaneous record (adopted by the board as an accurate record) of the proceedings at the meeting. The minutes were evidence of what they represented. They were more than a foundation for some further inference. Absent evidence to the contrary, ASIC proved its case by tendering the minutes and, through the evidence of Mr Baxter, identifying the document referred to as the "ASX Announcement". Pointing to other ways in which events *might* have occurred did not, without more, falsify the minutes.

A "failure" to call Mr Robb?

139 As noted earlier in these reasons, the Court of Appeal said[122] that, "[h]aving regard in particular to the failure to call Mr Robb, with consequences

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121 (2010) 274 ALR 205 at 265 [286].

122 (2010) 274 ALR 205 at 350 [796].

for the cogency of ASIC's case, we do not think ASIC discharged its burden of proof". It is necessary to set out the steps taken in the Court of Appeal's reasons in arriving at that conclusion.

140 The Court of Appeal concluded[123] that it would not be appropriate to reason by analogy from criminal procedure. The Court of Appeal noted[124] that s 1317L of the Corporations Act provided that "[t]he Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for … a declaration of contravention; or … a pecuniary penalty order". The Court of Appeal correctly observed[125] that it follows that a prosecutor's duty to call material witnesses at a criminal trial (as that duty has been identified by this Court in *Whitehorn v The Queen*[126] and *R v Apostilides*[127]) had no direct application to the proceedings ASIC had brought.

141 The Court of Appeal recorded[128] that ASIC accepted that it had "an obligation to act fairly with respect to the conduct of the proceedings" but ASIC did not accept that its obligation to act fairly required it to call Mr Robb as its witness. The Court of Appeal concluded[129], however, that Mr Robb should have been called by ASIC. The Court said[130]:

> "A body in the position of ASIC, owing the obligation of fairness to which it was subject, was obliged to call a witness of such central significance to critical issues that had arisen in the proceedings. The scope of its powers and the public interest dimensions of its functions, most relevantly with

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123 (2010) 274 ALR 205 at 331 [689]-[690], 332 [699].

124 (2010) 274 ALR 205 at 329-330 [680]-[686].

125 (2010) 274 ALR 205 at 329 [678], 332-333 [699]-[700].

126 (1983) 152 CLR 657; [1983] HCA 42.

127 (1984) 154 CLR 563; [1984] HCA 38.

128 (2010) 274 ALR 205 at 333 [701].

129 (2010) 274 ALR 205 at 347 [775].

130 (2010) 274 ALR 205 at 347 [775].

> respect to ensuring proper internal governance of corporations and that the market for securities in shares was fully informed, was such that resolution of the civil penalty proceedings required it to call, if only with a view to showing (if it were the case) that he could not in fact recall anything on the factual issues and for cross examination by the [defendants], a witness of such potential importance."

How this duty which the Court of Appeal identified ASIC as having differs in any relevant respect from the duty of a Crown prosecutor considered in *Whitehorn* and in *Apostilides* was not examined[131]. And insofar as the duty was said[132] to stem from a proposition "that the public interest can only be served if the case advanced on behalf of [a] regulatory agency does in fact represent the truth, in the sense that the facts relied upon as primary facts actually occurred", that premise is false for at least two reasons.

142 First, the proposition ignores that even a criminal trial "is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing upon the question of guilt or innocence"[133]. Each side in a criminal trial "is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility"[134]. Proceedings for declaration of contravention or pecuniary penalty order engage no more stringent requirements.

143 Second, the proposition that the public interest requires that the facts upon which a regulatory agency relies must be facts that "actually occurred" appears to require the regulatory agency to make some final judgment about what "actually occurred" before it adduces evidence. Deciding the facts of the case is a court's task, not a task for the regulatory authority.

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131 cf (2010) 274 ALR 205 at 335 [715].

132 (2010) 274 ALR 205 at 335-336 [717]; see also at 347 [776].

133 *Re Ratten* [1974] VR 201 at 214, quoted with approval in *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ; [1974] HCA 35.

134 *Ratten* (1974) 131 CLR 510 at 517.

144 The Court of Appeal concluded[135] that the failure to call Mr Robb significantly undermined "the cogency of ASIC's case on the passing of [the] draft ASX announcement resolution". Two, possibly three, distinct considerations were identified by the Court of Appeal as supporting that conclusion. First, it was said[136] that "[t]he failure of ASIC to call [witnesses including Mr Robb] engages the principle in *Blatch v Archer*[137] where Lord Mansfield said that 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted'". Second, it was said[138] that "[t]he cogency of ASIC's proof of passing the draft ASX resolution must be assessed with regard to the *Briginshaw*[139] principles, more correctly s 140 of the Evidence Act[140], and the nature of the relief claimed by ASIC and gravity of the consequences".

145 What may perhaps be seen as constituting a third strand in the Court of Appeal's reasoning was its treatment of the well-known decision of this Court in *Jones v Dunkel*[141]. The Court of Appeal, referring to *Ho v Powell*[142], treated[143]

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135 (2010) 274 ALR 205 at 347 [777]; see also at 350 [794]-[796].

136 (2010) 274 ALR 205 at 339 [730].

137 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

138 (2010) 274 ALR 205 at 350 [794].

139 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

140 Section 140 of the *Evidence Act* 1995 (NSW) provides:

> "(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:
>
> (a) the nature of the cause of action or defence, and
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> (b) the nature of the subject-matter of the proceeding, and
>
> (c) the gravity of the matters alleged."

141 (1959) 101 CLR 298; [1959] HCA 8.

what it described as "the principle in *Jones v Dunkel*" as being "a 'particular application of [the] principle' in *Blatch*". The Court of Appeal considered[144], however, that what it found to be ASIC's breach of a duty to call Mr Robb took matters beyond what was decided in *Jones v Dunkel*. The Court said[145] that

> "[t]he failure to call Mr Robb means more than disinclination to draw inferences favourable to ASIC's case. Failure 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".

146 It is convenient to deal separately with each of these aspects of the reasoning of the Court of Appeal, although each was a necessary element in that reasoning.

The source and content of the duty of fairness?

147 It may readily be accepted that courts and litigants rightly expect that ASIC will conduct any litigation in which it is engaged fairly. Nothing that is said in these reasons should be taken as denying that ASIC should do so. But the Court of Appeal concluded that ASIC was under a duty in this litigation to call particular evidence and that breach of the duty by not calling the evidence required the discounting of whatever evidence ASIC did call in proof of its case. Neither the source of a duty of that kind, nor the source of the rule which was said to apply if that duty were breached, was sufficiently identified by the Court of Appeal or in argument in this Court.

148 Rather, argument for the respondents in this Court proceeded, for the most part, by asserting that the actual conclusions reached by the Court of Appeal about the consequences of ASIC not calling Mr Robb could be shown to be correct, even without regard to questions of duty and fairness, and that it was thus not necessary to consider how the duty to which the Court of Appeal

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142 (2001) 51 NSWLR 572 at 576 [16].

143 (2010) 274 ALR 205 at 339 [730].

144 (2010) 274 ALR 205 at 350 [794]-[795].

145 (2010) 274 ALR 205 at 350 [795].

referred was derived or what the content of the duty might be. And because it will later be shown that ASIC not calling Mr Robb worked no unfairness to the respondents or other defendants at trial it is neither necessary nor desirable to explore the issues about source or content of the asserted duty in any detail. It is enough to observe the following considerations.

149 A proceeding brought by ASIC for a declaration of contravention, civil penalty or disqualification is necessarily brought in federal jurisdiction[146]. For the purposes of s 75 of the Constitution, ASIC is the Commonwealth[147]. It follows that the provisions of the *Judiciary Act* 1903 (Cth) are engaged and must be considered in determining how the proceedings are to be conducted. In particular, ss 79 and 80 of the *Judiciary Act* are engaged. And in considering how those sections would apply to pick up relevant State or Territory laws or the common law of Australia so as to provide for a duty of the kind hypothesised, it would be necessary to consider whether and to what extent laws of the Commonwealth such as the Corporations Act or the *Australian Securities and Investments Commission Act* 2001 (Cth) otherwise provide. None of these issues was considered by the Court of Appeal in connection with its holding that ASIC owed the defendants a duty of fairness that required ASIC to call Mr Robb.

150 In this Court, the Solicitor-General of the Commonwealth submitted on behalf of ASIC that no duty of the kind found by the Court of Appeal should be held to apply because s 64 of the *Judiciary Act* precluded that conclusion. It was submitted that to find such a duty would not be consistent with the requirement made by s 64 that "[i]n any suit to which the Commonwealth … is a party, the rights of parties shall as nearly as possible be the same … as in a suit between subject and subject".

151 Whether s 64 of the *Judiciary Act* has an operation of the kind for which ASIC contended is a large question which need not be decided. The respondents submitted that the purposes of s 64 are better seen as giving rights to private parties that they otherwise would not have in suits to which the Commonwealth is a party, such as the right to obtain discovery[148], rather than as denying that the

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146 Constitution, s 75(iii).

147 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [2001] HCA 1.

148 *Naismith v McGovern* (1953) 90 CLR 336; [1953] HCA 59.

Commonwealth has any special duty or obligation in such a suit. It is not necessary, however, to explore these issues further.

152 For the purposes of deciding these matters, it is convenient to assume, without deciding, that ASIC is subject to some form of duty, even if a duty of imperfect obligation, that can be described as a duty to conduct litigation fairly. What consequences might be thought to follow if failure to call a witness could, and in a particular case did, amount to a breach of a duty of that kind can then be elucidated by reference first to prosecutorial duties in criminal proceedings.

153 What was held by this Court in *Apostilides* to be the duty of a Crown prosecutor in relation to the calling of evidence must be understood in the light of a number of relevant considerations. First, it is to be remembered that a criminal trial is an accusatorial process in which the prosecution bears the burden of proving its case beyond reasonable doubt[149]. The prosecutor's duty stems from the very nature of the proceedings. Second, as this Court pointed out in *Apostilides*[150], the conclusion that a prosecutor has failed to call a witness who should have been called does not, of itself, require the further conclusion that the conviction recorded at that trial must be set aside. Rather, in the words of the common form criminal appeal statute, the question would be whether, having regard to the conduct of the trial as a whole, there was "on any other ground whatsoever a miscarriage of justice". If a prosecutor's failure to call a witness who should have been called occasioned a miscarriage of justice, the conviction entered at trial would be set aside and a new trial would be ordered. The failure to call the witness could not, and would not, found any reassessment of the evidence that was called at trial, let alone any suggestion that the cogency of that evidence should be discounted.

154 Indeed so much appears to have been recognised at the trial when trial counsel for Mr Terry applied for an order that ASIC call Mr Robb or for an order that the proceedings be stayed until ASIC did so. Trial counsel accepted that the primary judge was bound by the decision in *Adler v Australian Securities and*

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149 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; [2000] HCA 3; *Hargraves v The Queen* (2011) 85 ALJR 1254 at 1261-1262 [41]; 282 ALR 214 at 223-224; [2011] HCA 44.

150 (1984) 154 CLR 563 at 575.

Investments Commission[151] to refuse the application. The point was agitated in the appeals to the Court of Appeal in the present matters but again rejected[152] on the basis that the Court of Appeal should not depart from what was held in *Adler* and on the further basis that the argument for a stay depended upon equating proceedings for declaration of contravention and civil penalty with criminal prosecution when s 1317L denied such a step. As already noted, those conclusions of the Court of Appeal should be accepted.

155 But it is then important to recognise what conclusions could follow if, as the Court of Appeal held, ASIC was under a duty to call Mr Robb. If there was such a duty (and these reasons will explain that ASIC not calling Mr Robb was *not* unfair to the respondents or any other defendant) it would be expected that the remedy for breach of the duty would lie either in concluding that the primary judge could prevent the unfairness by directing ASIC to call the witness or staying proceedings until ASIC agreed to do so or, if the trial went to verdict, in concluding that the appellate court should consider whether there was a miscarriage of justice that necessitated a retrial. But no solution to the hypothesised unfairness could be found by requiring that the primary judge or an appellate court apply some indeterminate discount to the cogency of whatever evidence was called in proof of ASIC's case. This would seem to be no more than an attempt to "punish" a regulatory authority by denying it the relief it seeks. But that approach would fail to recognise that the regulatory authority seeks the remedy it does for public and not its own private purposes. It is an approach that would seek to supplement, needlessly, the long-established and generally applicable principles that are engaged when a party to litigation does not call evidence that it could be expected to call[153]. The asserted principle would evidently have no satisfactory roots. And because the notion of "discounting" the evidence is necessarily indeterminate, the asserted principle would have no certain content.

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151 (2003) 179 FLR 1 at 150-151 [678].

152 (2010) 274 ALR 205 at 329-333 [678]-[700].

153 *Jones v Dunkel* (1959) 101 CLR 298.

No unfairness in fact

156 In any event, ASIC not calling Mr Robb as a witness in its case occasioned no unfairness to the respondents or other defendants at the trial.

157 The Court of Appeal identified[154] Mr Robb as a witness who *should* have been called by ASIC on the basis that he attended the February board meeting and had "sufficient concern" in what was said and done at the meeting as a person responsible for advising on "many legal aspects of the establishment of the [MRCF]" that it could be expected that he would have given attention to (and thus may recall) the events of the meeting. The majority of the Court of Appeal distinguished[155] the position of Mr Robb from that of the investment bankers who attended the meeting – Messrs Wilson and Sweetman – on the basis of Mr Robb's greater "degree of involvement" in the events of the meeting.

158 As already noted, the Court of Appeal considered[156] that Mr Robb should have been called even if he could not recall *anything* about what was said or done at the February board meeting. The Court of Appeal was wrong not to examine what evidence Mr Robb would in fact have been expected to give. Examination of that question shows why it was not right to say that "fairness" required ASIC to call him.

159 Before the trial started, ASIC told Gzell J and the defendants that it expected to call Mr Robb as a witness. Directions had been given by Gzell J requiring ASIC to use its best endeavours to provide the defendants with affidavits or outlines of evidence to be given by the witnesses it intended to call[157]. Some days after the trial began, Mr Robb's solicitors gave ASIC's solicitors a draft of part of his proposed statement[158]. That draft was not put in evidence at the trial but was given to the defendants' representatives before ASIC closed its case. Mr Robb later indicated that he was not willing to confer with

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154 (2010) 274 ALR 205 at 344-345 [761].

155 (2010) 274 ALR 205 at 345-346 [768]-[770].

156 (2010) 274 ALR 205 at 347 [775].

157 (2010) 274 ALR 205 at 326 [653].

158 (2010) 274 ALR 205 at 326 [656].

the defendants' representatives. The Court of Appeal referred[159] to some of the content of the statement Mr Robb had prepared but made those references in connection with the appeal by Mr Terry against the primary judge's refusal of a stay of proceedings. The draft not having been put in evidence at trial, it is necessary to resolve the present issues without examination of its content.

160 The Court of Appeal proceeded on the footing that because Mr Robb had attended the February board meeting he "was *potentially* a very important witness of fact"[160] (emphasis added). So much may readily be accepted. But what was the evidence that Mr Robb was *in fact* likely to give about what was said or done at that meeting? What evidence Mr Robb was likely to have given, as distinct from what evidence he *might* theoretically have been in a position to give, is critical to any determination of what "fairness" required in this case. And consideration of what evidence Mr Robb was likely to have given must take account of what other evidence showed about the work he did in connection with the February board meeting.

161 The minutes of the February board meeting that were ultimately adopted were prepared under Mr Robb's supervision. Several drafts of the minutes were prepared before the meeting was held. As early as 7 February 2001, a draft was sent by an employee solicitor of Allens to Mr Shafron at JHIL and to Mr Robb (and another solicitor at Allens) setting out a series of resolutions dealing with the separation of Coy and Jsekarb from the James Hardie group. This draft (and all subsequent drafts) included[161] a minute about tabling and adoption of an ASX announcement. As has been explained, the first draft was substantially in the same terms as the minute ultimately adopted. After 7 February, several further drafts were prepared until, on the morning of the meeting, Mr Robb sent Mr Shafron a draft which set out those who were to attend the meeting and, as with earlier drafts, included a minute about tabling and adoption of a draft ASX announcement. Some further changes were made to the minutes after the meeting but the detail of those changes is not presently important. And as already noted, Allens sent JHIL its bill, at the end of March 2001, for work that included settling the minutes of JHIL in relation to the separation proposal.

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159 (2010) 274 ALR 205 at 327 [664].

160 (2010) 274 ALR 205 at 328 [672].

161 (2010) 274 ALR 205 at 297 [476].

162 The respondents submitted that it should not be inferred from the rendering of this bill that Mr Robb looked again at the minutes after the February meeting. The better view of the evidence would require rejection of that submission. But even if it were accepted, the evidence that Mr Robb could be expected to give of what was said or done at the February meeting would have to be assessed in light of the part he had played in preparation of the minutes that were ultimately adopted by the board as a correct record of what was decided at the February meeting. It could be expected that Mr Robb could have given evidence to the effect (a) that he recalled what was said and done at the meeting and it accorded with the minutes which had been drafted and settled under his supervision, or (b) that he had no independent recollection of some or all of what transpired at that meeting, or (c) some mixture of the two. It seems unlikely that he would say that he had not seen, in any of the successive drafts, the reference to tabling and adoption of a draft ASX announcement, a copy of which, as the respondents emphasised for other reasons, he had been given and he had annotated. It seems very unlikely that he would say, contrary to his own interests and the interests of the firm of which he was a member at the relevant times, that he positively remembered that what was recorded in the minutes was untrue.

163 A conclusion that it was "unfair" for ASIC not to have called Mr Robb as its witness necessarily proceeded from an assumption that ASIC's conduct denied the defendants in the proceedings some advantage or subjected them to some disadvantage. That advantage or disadvantage was never identified. General reference was made to the defendants being denied the opportunity to cross-examine Mr Robb. But to what effect? No reason is advanced to suppose that Mr Robb would have sworn to a positive recollection that a draft announcement was neither tabled nor approved. General reference was made to the difficulty of the defendants calling him "blind" – without knowing what he would say. (It may be doubted that this was the true position once ASIC gave the defendants part of Mr Robb's statement.) But in any event why would that difficulty cause unfairness if he could not be expected to give evidence that would *deny* that a draft announcement was tabled and adopted? ASIC not calling Mr Robb caused no unfairness to the respondents or other defendants at trial. The position in relation to Messrs Wilson and Sweetman was no different.

The cogency of proof

164 The Court of Appeal concluded[162] that ASIC's failure to call Mr Robb had "consequences for the cogency of ASIC's case". By this the Court of Appeal meant[163] that the cogency of ASIC's proof was diminished.

165 Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. Principles governing the onus and standard of proof must faithfully be applied. And there are cases where demonstration that other evidence could have been, but was not, called may properly be taken to account in determining whether a party has proved its case to the requisite standard. But both the circumstances in which that may be done and the way in which the *absence* of evidence may be taken to account are confined by known and accepted principles which do not permit the course taken by the Court of Appeal of discounting the cogency of the evidence tendered by ASIC.

166 Lord Mansfield's dictum in *Blatch v Archer*[164] that "[i]t is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" is not to be understood as countenancing any departure from any of these rules. Indeed, in *Blatch v Archer* itself, Lord Mansfield concluded[165] that the maxim was not engaged for "it would have been very improper to have called" the person whose account of events was not available to the court.

167 This Court's decision in *Jones v Dunkel* is a particular and vivid example of the principles that govern how the demonstration that other evidence could have been called, but was not, may be used. The essential facts of the case, though well known, should be restated. The personal representative of a driver who had died in a collision with another vehicle brought an action for damages on her own behalf and on behalf of the deceased driver's dependants. The

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162 (2010) 274 ALR 205 at 350 [796].

163 (2010) 274 ALR 205 at 343 [753], 350 [795].

164 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

165 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

plaintiff's case depended upon demonstration that the other driver's negligence was a cause of the accident. The plaintiff sought to demonstrate negligence by having the tribunal of fact (in that case a jury) infer from facts concerning the road and the two vehicles involved that the collision had occurred when the defendant's vehicle was on the wrong side of the road. One of the defendants, the surviving driver, did not give evidence at the trial. The Court divided about whether the inference which the plaintiff sought to have the jury draw about where the collision occurred was an inference that was open on the evidence. But the Court held[166] "that any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence".

168 The Court of Appeal concluded[167] that ASIC's not calling Mr Robb founded an inference that his evidence "would not have assisted the ASIC case". There was no basis for drawing any inference that Mr Robb would have given evidence *adverse* to ASIC's case. More particularly, there was no basis for concluding that it was more likely than not that he would say that the minutes whose preparation he had supervised were false. The most that could be inferred from Mr Robb not being called by ASIC was that he could not give evidence, from his own independent recollection, of what had happened at the February board meeting. He was not "a person presumably able to put the true complexion on the facts relied on [by ASIC] as the ground"[168] for any inference that ASIC sought to have drawn from the evidence. And contrary to the conclusions reached by the Court of Appeal, what Lord Mansfield said in *Blatch v Archer* permitted no larger conclusion.

169 ASIC had tendered admissible evidence that, if accepted, showed that the draft ASX announcement had been tabled and approved. This was not a case

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166 *Jones v Dunkel* (1959) 101 CLR 298 at 308 per Kitto J; see also at 312 per Menzies J, 320-321 per Windeyer J.

167 (2010) 274 ALR 205 at 339 [731].

168 (1959) 101 CLR 298 at 308.

where ASIC's case depended on inference, let alone on "uncertain inferences"[169], or where there was a question about whether "limited material is an appropriate basis on which to reach a reasonable decision"[170]. It was not a case where "the missing witness would be expected to be called by one party rather than the other" or where it was known that "his evidence *would* elucidate a particular matter"[171] (emphasis added). It was the respondents' case that depended upon inference. The inference they sought to have drawn was that the minutes were not accurate evidence of tabling and approval. ASIC not calling Mr Robb did not entail that the inference which the *respondents* sought to have drawn could be more safely drawn. It was not to be expected that ASIC would call him (and the respondents *not* call him) if Mr Robb would have given any evidence that cast doubt on whether the minutes were accurate.

170 The fact that ASIC did not call Mr Robb did not affect (in the sense of *diminish*) the cogency of the proof which ASIC advanced. Yet that is the conclusion the Court of Appeal reached: that the cogency of ASIC's proof was *diminished* because Mr Robb was not called to say no more than "I do not recall".

Conclusion and orders

171 The Court of Appeal was wrong to set aside the primary judge's finding that the 7.24 draft announcement was tabled at and approved by the directors of JHIL at their meeting on 15 February 2001. It follows that ASIC's appeals to this Court should be allowed with costs and consequential orders made.

172 ASIC sought consequential orders that would dismiss so much of the respondents' appeals to the Court of Appeal as related to the declarations of contravention made by the primary judge that were founded upon the directors' approval of the 7.24 draft announcement. ASIC also sought orders that the respondents pay costs in the Court of Appeal in relation to that issue. ASIC accepted that the issues raised by those grounds of appeal to the Court of Appeal

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169 *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559 at 592 [119].

170 *Ho v Powell* (2001) 51 NSWLR 572 at 576 [14].

171 *Payne v Parker* [1976] 1 NSWLR 191 at 201.

that concerned relief from liability, disqualification and penalty should be remitted to that Court for its determination.

173 In the cases of Mr Terry and Mr O'Brien, ASIC sought orders remitting to the Court of Appeal the issues raised by ASIC's cross-appeals to that Court about costs as between ASIC and Messrs Terry and O'Brien. In the case of Mr Shafron, ASIC sought orders that would permit the reconsideration of what sanction or sanctions should be imposed upon him in light of all of the contraventions found against him as well as consideration of his appeal to the Court of Appeal in relation to questions of relief from liability and penalty.

174 In each of the appeals brought to the Court of Appeal by non-executive directors, ASIC cross-appealed to raise a number of issues "if … it is found that it was not a contravention to have voted in favour" of the resolution approving the 7.24 draft announcement[172]. ASIC having succeeded in its appeals to this Court, the issues raised by those cross-appeals do not arise and the orders made by the Court of Appeal dismissing the cross-appeals should stand.

175 Given that questions of relief from liability and penalty remain to be decided by the Court of Appeal, the better course is not to make orders of the kind sought by ASIC dealing with part only of the several appeals to the Court of Appeal. In particular, no order should now be made dealing with the costs of only one of the issues raised in the proceedings in the Court of Appeal.

176 In each of ASIC's appeals to this Court other than the appeals relating to Mr Terry, Mr O'Brien and Mr Shafron, orders should be made in the following form:

1. Appeal allowed with costs.

2. Set aside pars (a), (b), (c) and (e) of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 December 2010.

3. Remit the matter to the Court of Appeal for determination of so much of the appeal to that Court as relates to relief from liability and penalty.

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172 (2010) 274 ALR 205 at 361 [835], 367 [869].

4. The costs of the proceedings in the Court of Appeal are to be in the discretion of that Court.

177 In the appeals relating to Mr Terry and Mr O'Brien, orders in the form of pars 1, 2 and 4 of the orders set out above should be made but par 3 of the orders should provide:

3. Remit the matter to the Court of Appeal for determination of

(a) so much of the appeal to that Court as relates to relief from liability and penalty; and

(b) the cross-appeal to that Court in relation to costs.

178 In the case of ASIC's appeal relating to Mr Shafron, orders should be made as follows:

1. Appeal allowed with costs.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 December 2010 in Matter No 2009/00298416, in which Peter James Shafron was appellant and Australian Securities and Investments Commission was respondent.

3. Remit the matter to the Court of Appeal for determination of so much of the appeal and cross-appeal in that matter as relates to penalty.

4. The costs of the proceedings in the Court of Appeal are to be in the discretion of that Court.

179 HEYDON J. On 15 February 2001 the James Hardie group of companies were haunted by a spectre – the spectre of asbestos litigation. This had been so for many months. But on that day they hoped to banish it for good.

Events up to 14 February 2001

180 The spectre did not directly affect the holding company of the James Hardie group, James Hardie Industries Ltd. But it had enormous indirect effects. That company was a public company. Its shares were traded on the Australian Stock Exchange ("the ASX"). It had manufactured and sold asbestos products. But it had ceased to do so in 1937. Two of its wholly owned subsidiaries had manufactured and sold asbestos products much more recently. James Hardie & Coy Pty Ltd did so from 1937 to 1987. Jsekarb Pty Ltd did so from 1978 to 1987. No company in the James Hardie group manufactured or sold asbestos after 1987. However, many people made claims against the two companies last mentioned for physical injury allegedly caused by their exposure to asbestos. Directors and executives of the companies anticipated that many similar claims would be made. They faced an intractable problem. At any one moment they knew what claims had been made. They knew approximately what it would cost to meet those claims. They knew or ought to have known that over time that cost had risen faster than the rate of inflation. But they could not know of the group's asbestos liabilities which had been incurred but not yet reported. Nor could they know of liabilities which had not yet been incurred but in time would be. The time before they gained accurate knowledge could be very long. That is because some asbestos-related diseases are contracted only many years after exposure, and diagnosed later still. The state of asbestos litigation involving the James Hardie group was constantly examined at board meetings. Asbestos litigation was seen as affecting the share price. It was seen as jeopardising the long-term future of the subsidiaries. It was seen as jeopardising perhaps even the survival of the group as a whole.

181 To some extent judicial authority had appeared to immunise James Hardie Industries Ltd from legal responsibility for its subsidiaries' asbestos liabilities[173]. But the board was concerned that, whether by a change in the stream of judicial authority or by legislative intervention, liability for or the responsibility to meet asbestos claims might be made to fall upon James Hardie Industries Ltd itself. Hence, as the Court of Appeal stated, James Hardie & Coy Pty Ltd and Jsekarb Pty Ltd were something of a millstone hanging around the group's neck.

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173 *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554. Cf *CSR Ltd v Wren* (1997) 44 NSWLR 463, where a parent company's involvement in its subsidiary's operations gave rise to a duty of care owed by the parent to an employee of the subsidiary.

182 On 2 July 1998 James Hardie Industries Ltd issued an announcement to the ASX of its intention to form a wholly owned subsidiary in The Netherlands. That company was to acquire all the operating companies in the James Hardie group. The board had discussed the proposal on 2 June 1998. The board had approved the proposal and the announcement on 30 June 1998. However, the plan was not fully implemented: James Hardie & Coy Pty Ltd and Jsekarb Pty Ltd remained subsidiaries of James Hardie Industries Ltd.

183 On 3 December 1999, Mr Morley, the Chief Financial Officer, signed a board paper concerning "Project Green". Project Green involved a scheme of arrangement under which existing James Hardie Industries Ltd shareholders would exchange four out of every five shares for four shares in "Newco NV, a listed company which would have full ownership of the JHNV group." The paper went on: "The remaining 1 JHIL share currently held by each existing shareholder would continue to be so held, but would own only the rump portion of James Hardie, including [James Hardie & Coy Pty Ltd]." The paper described various tax and other advantages in the plan. It also listed some "[m]ajor issues". One was "increased take-over risk" with "the asbestos litigation poison pill clearly separated from operating assets". Another was "obtaining shareholder and Court approval to a Scheme of Arrangement for this corporate reorganisation, and minimising the opportunity for asbestos-related spoilers to interfere and object".

184 At the 17 February 2000 board meeting of James Hardie Industries Ltd Mr Morley presented a paper dated 4 February 2000. It stated that one of the "major drivers" for Project Green was "the desire to effect a separation of James [Hardie Industries Ltd]'s ongoing operating assets from the legacy liabilities contained in [James Hardie & Coy Pty Ltd]." It listed as a working assumption for Project Green that "there must be a strong probability that the transactions to establish the structure can be completed, without disruption by spoilers or legal/regulatory difficulties". At the 17 February 2000 meeting, Mr Shafron, the General Counsel and Company Secretary, also presented a paper dated 4 February 2000. Part D, "Big Picture Options", discussed possible ways to assist James Hardie Industries Ltd "in separating itself from its asbestos liability."

185 Papers or slide presentations discussing various possible solutions to the problem created by the inherited asbestos liabilities were presented to the board at its meetings held on 13-14 April 2000, 17 May 2000, 13 July 2000, 18 August 2000, 15 November 2000, 13 December 2000 and 17 January 2001.

186 By at least this period, if not earlier, compensation of asbestos claimants had become a matter of public interest in several senses of that expression. Within the board and senior management there was a keen awareness that the success of the separation proposal depended upon the reaction of "stakeholders". The expression "stakeholders" was not limited to existing or prospective shareholders. It included asbestos victims groups, unions, plaintiffs' law firms,

the Government and the media. The board and senior management saw the media as important in moulding reaction to what was done to remove asbestos liability from the group. There was, to use the words of an April 2000 board paper, "a raft of potentially hostile and emotional stakeholders". What would have made them not merely potentially but actually hostile and emotional would have been an insufficiency of funding, upon separation, to meet asbestos claims against James Hardie & Coy Pty Ltd and Jsekarb Pty Ltd[174]. The trial judge found that the material coming to the board from April 2000 to February 2001[175]:

> "advised that a successful communications strategy was essential to the achievement of any separation and central to that was the need to convince stakeholders that there were sufficient assets available to meet asbestos claims."

187 The difficulty was, as a slide presentation by management to the August 2000 board meeting put it, "we cannot argue strongly that the funds left behind will be sufficient under every conceivable scenario"[176]. Thus both the board and management were acutely conscious of the sufficiency question. They were also acutely conscious of the allied and inseverable question of how to communicate with "stakeholders" about sufficiency.

188 On 13 December 2000, the Chief Executive Officer sent a memorandum to directors. He foreshadowed that at the 17 January 2001 board meeting, approval would be sought to establish a foundation as trustee of the shares in James Hardie & Coy Pty Ltd. This was seen as removing it from the James Hardie group. The matter was urgent. Management feared that before March 2003 – perhaps as early as July 2001[177] – a new Australian accounting standard would be adopted. That standard would compel James Hardie Industries Ltd to include in its balance sheet an undiscounted estimate of the long-term total asbestos liabilities to which it might be subject. Management had earlier feared that this could significantly affect the balance sheet. The estimate of asbestos liabilities might be more than the market was expecting. The memorandum did not omit reference to a "communications strategy". It said,

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174 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 219 [59].

175 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199 at 270 [397].

176 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 221 [64].

177 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 219 [57] and 223 [77].

optimistically, that "press releases would explain the creation of the trust as providing certainty for creditors and potential claimants that the assets of [James Hardie & Coy Pty Ltd] were irrevocably secured for their benefit".

189 The board papers for the 17 January 2001 meeting included a paper explaining the proposal. The foundation was to hold the shares in Jsekarb Pty Ltd as well. The proposal would ensure that approximately $214 million would be available for the creditors, including future asbestos claimants, of the two subsidiaries. The paper warned that legislatures might declare James Hardie Industries Ltd or another company in the group liable for the asbestos-related liabilities. It warned that legislatures might freeze the assets of that company or those companies until undertakings about suitable financial support of James Hardie & Coy Pty Ltd and Jsekarb Pty Ltd were given. The paper contained a draft press release and draft questions and answers. It recommended that for various reasons this announcement should be made at the same time as the James Hardie group's third quarter results were announced, on 16 February 2001. The Court of Appeal found that these documents did not convey the proposition that all asbestos claims were fully funded.

190 On 17 January 2001 the board met. Mr Baxter (Senior Vice President, Corporate Affairs) gave a presentation on the communications strategy. But the board rejected the proposal. The minutes stated:

> "The Chairman noted that the concept appeared to have some merit, but that the question of funding for the Company required more work. He requested management to continue developing the concept and to report progress, particularly in relation to funding, at the February meeting."

The Court of Appeal gave three reasons for the board's rejection of the proposal. The adequacy of funding was seen as a moral issue. The proposal would not be well received by stakeholders. The communications strategy as presented would not be able to neutralise potential stakeholder opposition.

191 The board papers for the 15 February 2001 meeting proposed increased funding for the foundation. The board papers also included communications strategy documents. They said that it was not possible to assure external stakeholders that funds set aside would be sufficient to meet all future claims by victims of asbestos diseases. The Court of Appeal found that these documents did not promise full funding for asbestos claimants. The papers included a demand by the Chief Executive Officer for a decision at that meeting, on the ground that the new accounting standard would be promulgated before 31 March 2001, the end of the James Hardie group's financial year. If the proposal were approved, it would be necessary to make an announcement to the ASX.

The legal background to the events of 14-16 February 2001

192 The issues in these appeals turn on what happened on 14-16 February 2001. In evaluating the probabilities, it is useful to bear in mind two key groups of legal obligations on James Hardie Industries Ltd.

193 If there were no announcement to the ASX, adoption of the separation proposal would be information that was not generally available. It would also be information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of James Hardie Industries Ltd shares. By reason of s 1001A of the *Corporations Act* 2001 (Cth)[178], read with r 3.1 of the ASX Listing Rules, James Hardie Industries Ltd would have been obliged "immediately" to tell the ASX that information. Quite apart from the commercial significance of any "communications strategy", the company's legal obligations made the questions of which directors or officers of the company should prepare, approve and issue an announcement to the ASX, and what it should say, crucial.

194 The other group of legal obligations related to the minutes of the directors' meeting of 15 February 2001. James Hardie Industries Ltd was under an important statutory duty to keep minute books in which within one month of directors' meetings it recorded the proceedings and resolutions, and ensured signature by the chair of the meeting or of the next meeting[179]. Further, if that duty had been complied with, s 251A(6) would have created a presumption that any resolution recorded in the minutes had been passed, rebuttable only if the contrary had been "proved". Although these duties rested on the company, in the last resort the directors were responsible for ensuring compliance with them – particularly since the relevant resolutions to be recorded were those of the directors themselves. Non-compliance with s 251A(1) and (2) was a criminal offence punishable by fine. Further, s 1307(1) made it a criminal offence punishable by fine for an officer of a company to falsify a book affecting or relating to its affairs. Section 1308(2) provided that a person who, in a document required by the Corporations Act, made or authorised the making of a statement that to the person's knowledge was false or misleading in a material particular was guilty of a criminal offence punishable by fine. Section 1308(4) provided that a person who, in a document required by the Corporations Act, made or authorised the making of a statement that was false or misleading in a material particular without having taken reasonable steps to ensure that it was not false or misleading was guilty of a criminal offence punishable by fine.

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178 This legislation was not in force on the relevant date, but equivalent legislation was. It is convenient throughout to refer to the legislation as the Corporations Act.

179 See Corporations Act, s 251A(1)-(2).

195 The relevance of this consideration goes beyond legal obligation. Provisions of this kind correspond with a strong feeling that accurate minutes should be kept of general meetings and committee meetings in organisations of all kinds. They include businesses; educational and medical institutions; social and sporting clubs; cultural and religious groups; professional and trade associations; trade unions; community bodies and political parties. The members of these organisations, humble as they often are, see it as important that minutes accurately record what took place. How much greater is the importance of accurate minutes in the case of directors running a large wealthy multinational public company, listed on stock exchanges, in which thousands of people had invested on the faith of a belief that its affairs were efficiently conducted?

196 At the heart of these extraordinarily complex appeals lies a single simple issue. The minutes of the 15 February 2001 meeting recorded a resolution approving an "announcement to the ASX". They stated:

> "**ASX Announcement**
>
> The Chairman tabled an announcement to the ASX whereby the Company explains the effect of the resolutions passed at this meeting and the terms of the Foundation (ASX Announcement).
>
> **Resolved** that:
>
> (a) the Company approve the ASX announcement; and
>
> (b) the ASX Announcement be executed by the Company and sent to the ASX."

The Court of Appeal noted that this statement was "fairly prominent, even on a scan of the minutes"[180]. The respondents submitted that the minutes in that respect were false. The Court of Appeal so found. To find that the minutes of a company listed on the ASX were false in so important a respect was a serious matter legally and commercially. It is fundamental to the running of so large and important an organisation as the James Hardie group that the records of its central decision making organ be correct, lest the foundations on which its future affairs rested be left to the vagaries of corporate memory and changing personnel.

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180 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 301 [496].

The events of 14-16 February 2001

197 At 7.28pm on 14 February 2001 a significant event took place. A draft announcement was prepared ("the 7.28pm Draft Announcement"). In it, the Chief Executive Officer said, for the first time, that the foundation would have sufficient funding for all future asbestos claims. That was a fateful and dangerous statement. It turned out to be false to a very considerable degree.

198 On 14 February 2001 senior counsel supplied a written opinion. It contained dismal tidings: that despite *James Hardie & Co Pty Ltd v Hall*, James Hardie Industries Ltd could be liable for asbestos liabilities after 1980 if it were found to be directing the affairs of the subsidiaries[181]. This opinion confirmed one of the warnings in the 17 January 2001 board papers. The opinion was tabled at the 15 February 2001 meeting.

199 By the time the directors assembled on the morning of 15 February 2001, it was clear that the sands in the glass were running down. The moment of truth had arrived. Management had poured the wine. Would the directors drink it?

200 They did. Or at least according to the minutes of the 15 February 2001 meeting they did. The minutes recorded the board as implementing a "separation proposal". James Hardie & Coy Pty Ltd and Jsekarb Pty Ltd would be separated from the rest of the James Hardie group. The meeting was attended by the Chief Executive Officer (Mr Macdonald), the Chief Financial Officer (Mr Morley), the Chairman (Mr McGregor, now deceased), two representatives of James Hardie Industries Ltd's solicitors (Mr Peter Cameron, now deceased, and Mr Robb) and two outside corporate advisers (Messrs Wilson and Sweetman). It was also attended by five non-executive directors (Mr Brown, Ms Hellicar, Mr O'Brien, Mr Terry and Mr Willcox). The General Counsel and Company Secretary (Mr Shafron) was also present. Two non-executive directors, Mr Gillfillan and Mr Koffel, participated by telephone. The last eight-named persons were defendants at trial and are respondents to these appeals. Mr Baxter and Mr Harman (Financial Controller) were also present. Mr Brown, Mr Gillfillan, Ms Hellicar and Mr Koffel will below be referred to as the Hellicar respondents.

201 The separation proposal involved the following steps. James Hardie Industries Ltd's shares in James Hardie & Coy Pty Ltd and Jsekarb Pty Ltd would be cancelled. Jsekarb Pty Ltd would issue shares in itself to James Hardie & Coy Pty Ltd. James Hardie & Coy Pty Ltd would issue shares in itself to the Medical Research and Compensation Foundation ("the Foundation"). The intended effect of the separation proposal was that the only assets available to meet the claims of asbestos victims for which a James Hardie company was

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181 See above at [181] n 173.

liable would be the assets of James Hardie & Coy Pty Ltd, Jsekarb Pty Ltd and the Foundation, together with monies paid to the Foundation under a Deed of Covenant and Indemnity entered by James Hardie Industries Ltd, James Hardie & Coy Pty Ltd and Jsekarb Pty Ltd.

202 On 16 February 2001, James Hardie Industries Ltd announced its results for the third quarter (October-December 2000) of the financial year ending 31 March 2001. It also made an announcement to the ASX describing the separation proposal ("the Final ASX Announcement"). That announcement contained statements about the adequacy of funding to meet the claims of plaintiffs allegedly injured by asbestos. The trial judge found the statements to be false and misleading contrary to s 999 of the Corporations Act. The Court of Appeal did not disturb this finding. The trial judge found that Mr Brown, Ms Hellicar, Mr O'Brien, Mr Terry and Mr Willcox voted in favour of a resolution approving a document which Mr Baxter took to and distributed at the meeting – "the 7.24am Draft Announcement". Accordingly, the trial judge held that they approved the making of the Final ASX Announcement, which derived from the 7.24am Draft Announcement. In consequence, he found that they had contravened s 180(1) of the Corporations Act. The trial judge also found that each of Mr Gillfillan and Mr Koffel had contravened s 180(1) by failing to familiarise himself with the 7.24am Draft Announcement or by failing to abstain from voting to approve it. And the trial judge found that Mr Shafron had contravened s 180(1) by failing to advise the directors that the terms of the 7.24am Draft Announcement about adequacy of funding were too emphatic.

203 The Court of Appeal agreed with the trial judge's conclusions, on the assumption that the directors had approved the 7.24am Draft Announcement. But it disagreed with the trial judge's conclusions that they had in fact approved it, despite the minute recording approval[182].

The cases of the parties

204 The respondents' case turned on two allegations. First, despite what the minutes said, no resolution approving an ASX announcement had in fact been passed. Secondly, even if a resolution approving an announcement had been passed, it was not clear what that announcement was.

205 In contrast, ASIC's case was:

(a) Mr Baxter took a draft announcement to the meeting – the 7.24am Draft Announcement.

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182 See above at [35].

(b) He circulated that document at the meeting.

(c) The directors approved the 7.24am Draft Announcement, at least by informal resolution.

(d) The Final ASX Announcement was not in substance different, at least in its misleading aspects, from the 7.24am Draft Announcement, and hence the directors' approval of the 7.24am Draft Announcement was an approval of the Final ASX Announcement.

(e) The Final ASX Announcement involved the respondents in various contraventions of the Corporations Act.

In these appeals, steps (b), (c) and (d) are controversial – particularly step (c).

206 In relation to step (c), the existence of the minute recording the resolution may be said to have cast a "provisional" or "tactical" burden on the respondents[183]. If the minute had stood unanswered, it would have been possible, though not obligatory, for the trial judge to find for ASIC. A failure to call any evidence answering the minute would be risky. The respondents' submissions in these appeals appeared to underestimate the weight of the burden created by the minute. Five of them met the provisional or tactical burden by testifying to non-recollection of various kinds – Mr Brown, Mr Gillfillan, Ms Hellicar, Mr Koffel and Mr Willcox. Three of those five stated a belief that if the 7.24am Draft Announcement had been before the meeting, they would have remembered the event. These respondent-witnesses also relied on circumstantial evidence to negate what the minute said. Other respondents relied only on the testimony of others and circumstantial evidence. Mr Morley (Chief Financial Officer), on the other hand, thought the minute was correct. The 15 February 2001 meeting took place more than seven years before the trial. Testimony to the effect that a witness does not remember whether an event happened more than seven years ago is unsurprising. That evidence does not prove it did not happen. And even if the evidence of non-recollection is coupled with reasons why the event would probably have been remembered if it had happened, that is no decisive answer. In truth the resolution may have been put and passed during a long and complex meeting without a particular witness noticing its precise terms. If so, testimony that if the resolution had been considered the witness would not have voted for it is not necessarily convincing. There is much room for non-malevolent reconstruction. A much better guide to what probably happened is the directors' approval on 3 April 2001 of the minutes as a correct record. That was an approval of what had happened less than two months before – while events were

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183 See *Strong v Woolworths Ltd* (2012) 86 ALJR 267 at 279 [53]; 285 ALR 420 at 434; [2012] HCA 5.

fresh in the directors' memories. In view of that approval for the 15 February 2001 minute, it was not irrational for the trial judge to reject the respondents' testimony as mistaken so far as it contradicted the minute. It was in the respondents' interests to cast doubt on the minute by calling independent persons who had a role in its development and were present at the 15 February 2001 meeting. None of them did so.

207 The 7.24am Draft Announcement is so described because Mr Baxter sent it at that time on 15 February to the author of an earlier draft. As sent, it contained "text boxes" (ie "tracked changes") indicating deletions. It is now accepted that in the form it took without the text boxes, Mr Baxter brought it to the meeting. The 7.24am Draft Announcement said that the Foundation would have "sufficient funds to meet all legitimate compensation claims" and was "fully-funded". It was a development of the 7.28pm Draft Announcement. It must be distinguished from a modification of it ("the 9.35am Draft Announcement"). It must also be distinguished from the Final ASX Announcement, which embodied further changes.

208 The trial judge found that at the board meeting, the 7.24am Draft Announcement was distributed to all persons present, including Messrs Cameron and Robb. The Court of Appeal specifically found that this finding was correct in relation to Messrs Cameron and Robb. Though in other respects it did not endorse it, it did not specifically overturn it. Minutes of the 15 February 2001 meeting were prepared in draft before the meeting. They included reference to a resolution recording the tabling and approval of an ASX announcement in the same terms as those appearing in the final version of the minutes. An amended draft of 21 March 2001 was circulated to all directors before the next board meeting on 3-4 April 2001. At that meeting, the directors approved them as a correct record of the 15 February 2001 meeting. They were signed by the Chairman, Mr McGregor, as a correct record on some date soon after 7 April 2001. In view of the suspicion of flimsiness and doubt which the stance of the respondents in these proceedings caused to be attached to all minutes of meetings attended by directors of James Hardie Industries Ltd at this time, it should be added that the minutes of the 3-4 April 2001 meeting were themselves confirmed as correct and signed by the Chairman at the next meeting on 16 May 2001.

ASIC's case at trial

209 ASIC's pleadings alleged that what the minutes of the 15 February 2001 meeting said had happened at the meeting – that is, that a draft ASX announcement had been approved – had in fact happened. The central issue at trial was whether the directors had assented to the substance of the resolution by informal means.

210 Even in "draft" form, the minutes of the 15 February 2001 meeting presented for approval to the 3-4 April 2001 meeting constituted a business record of what had happened, admissible as an exception to the hearsay rule. Their probative force was increased by their approval on 3 April 2001. The minutes of the 3-4 April 2001 meeting also constituted an admissible business record. By the conduct it recorded, each director present on 3-4 April accepted for himself or herself the proposition that on 15 February 2001 a draft ASX announcement had been approved. Each thus made an admission to that effect. Mr Willcox was not present on 3-4 April, but his failure to protest at the contents of the draft minutes he received was capable of being treated as an admission by him as well. In evidence he accepted that he read the board papers, which included the draft minutes. He said that his practice was to spend one to three days reading board papers. Although he said it was not his practice to spend "much time" on the minutes of previous meetings, he did seek to assure himself that the essence of major decisions was recorded. He was not prepared to say that he had not read the minutes, and said that he could not recall seeing anything which was so badly misleading that he had cause to do anything about it.

211 Further, there is documentary evidence in the form of a bill from Mr Robb for work done in the period 5 February to 27 March 2001 for, inter alia, "settling ... board minutes" for James Hardie Industries Ltd, among other institutions. The respondents did not dispute that whatever work Mr Robb charged for, he did. But Mr Willcox and the Hellicar respondents argued that the compendious description of what was done, and the extensive range of documents necessary to effect separation, mean that an inference cannot be drawn that the work for which Mr Robb charged included work which he personally did in settling the 15 February 2001 minutes. However, the board meeting of 15 February 2001 was the most important event of the period. The correctness of its minutes was also very important. Mr Robb had been involved with colleagues in drafting the minutes before the meeting. He was liaising with Mr Shafron during the relevant period. He had been at the 15 February 2001 meeting. It is therefore likely that the 15 February 2001 minutes were among the "board minutes" which Mr Robb settled. There is no evidence that he disapproved them, and that is further support for their probative weight. Mr Robb would have been aware of the need to ensure accuracy in the minutes of a major public company in the relevant circumstances.

212 The probative weight of the minutes is also increased by the fact that there is no evidence that any member of management disapproved them, and there is evidence that several did not disapprove them. One member in the latter category was Mr Shafron, who attended both the 15 February and the 3-4 April 2001 board meetings, who was a legal practitioner, and who was the General Counsel and Company Secretary for James Hardie Industries Ltd. Others included the Chief Executive Officer and the Chief Financial Officer. The Chief Financial Officer, Mr Morley, received a draft of the minutes on 21 March 2001, and attended both the 15 February 2001 meeting and the

3-4 April 2001 meeting. He gave evidence that his "honest belief has always been that [the] minutes were accurate and correct".

213 The probative weight of the minutes is also supported by the urgent need to make a decision about the Foundation in view of the impending change in accounting standards. It is supported by the importance of an ASX announcement which was not only required by law but was seen as a key element in a "communications strategy", the goal of which was to reassure hypercritical stakeholders that asbestos claims would be fully met. It was discontent over that matter which seems to have influenced the board not to approve the management's proposal considered on 17 January 2001.

214 In all the circumstances, the following statement of the trial judge is scarcely surprising: "I do not accept that not one of the non-executive directors who gave evidence was aware of the recorded resolution in the draft minutes approving the [7.24am Draft Announcement]."[184]

215 The accuracy of the minutes is further confirmed by the directors' failure to protest about the terms of the Final ASX Announcement, which were in substance the same as those of the 7.24am Draft Announcement. In accordance with the usual practice for ASX announcements, the Final ASX Announcement was sent to the directors by facsimile and email. No director complained that the Final ASX Announcement had not been approved at the 15 February 2001 meeting. Further, a telephone conference was organised for 20 February 2001 so that the directors could hear a report on the aftermath of the "separation announcement". At least Ms Hellicar participated in it. Neither she nor any other director who might have participated made any complaint about the Final ASX Announcement. These facts increase the probability that an ASX announcement was approved on 15 February 2001 after the substantive separation proposal was approved. Indeed the board's approval of the substantive proposal was not readily separable from their approval of what stakeholders were to be told about it.

216 Finally, the probative weight of the minutes is supported by the circumstances leading up to the meeting. That meeting may have been the most significant in the company's history. The company in question was one of the largest and most important in the country. The directors knew that hostile critics would closely scrutinise the decision and company statements associated with it. They were acting in circumstances of extreme urgency. There was no legal capacity to resolve that there should be separation without announcing that fact to the ASX. There was no commercial point in resolving on separation without

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184 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199 at 379 [1203].

announcing that fact. And there was no commercial point in any announcement unless an assurance of sufficient funding for asbestos claims was given. To resolve that there should be separation without announcing any such assurance would create only damaging controversy from "hostile and emotional stakeholders" and "asbestos-related spoilers". The draft announcements in the hands of management on 14 and 15 February 2001, the last of which was taken into the meeting as the 7.24am Draft Announcement, spoke of sufficient or full funding for all legitimate claims. Taken together, these circumstances comprised immensely powerful evidentiary support for ASIC's case.

The failure to call Mr Robb

217 Why, then, did the Court of Appeal reject the minutes? Their Honours' reasoning centred on the failure of ASIC to call Mr Robb as a witness.

218 The Court of Appeal said[185]:

> "As a matter of fairness … Mr Robb should have been called by ASIC …
>
> The failure to call Mr Robb means more than disinclination to draw inferences favourable to ASIC's case. Failure 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 … Absence of evidence from Mr Robb, whom ASIC should have called, tells against achieving [satisfaction on the balance of probabilities to the *Briginshaw*[186] standard].
>
> … 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."

219 If the reasoning which led to these conclusions is sound in relation to Mr Robb, it is presumably sound in relation to Messrs Wilson and Sweetman, whom ASIC did not call either. Giles JA thought so, although Spigelman CJ and Beazley JA did not. However, the matter can be examined in principle by reference to Mr Robb alone.

220 Had the Court of Appeal not adopted this reasoning, it would probably have agreed with the trial judge's conclusion that the 7.24am Draft

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185 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 350 [794]-[796].

186 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 350 and 368-369; [1938] HCA 34.

Announcement had been approved. In that sense the reasoning was crucial. It is therefore desirable to examine it first.

The nature and consequences of the Court of Appeal's reasoning

221 The Solicitor-General of the Commonwealth, who presented ASIC's oral argument in chief, described a key part of the Court of Appeal's reasoning as "an interesting agglomeration of rather disparate thoughts." A little more politely, it might be said that the Court of Appeal's reasoning is long, detailed and complex. It has two strands.

222 The first strand rests on the idea that there was a "duty of fairness" which ASIC had allegedly breached: "Failure of a party with the onus of proof to call an available and important witness, … if the failure is in breach of the obligation of fairness, counts against satisfaction on the balance of probabilities". The second strand may exclude the need for a breach of a duty of fairness: "Failure of a party with the onus of proof to call an available and important witness … counts against satisfaction on the balance of probabilities"[187].

223 Before examining the merits of each strand in the Court of Appeal's reasoning, it is appropriate to describe its consequences, to seek to explain those consequences, and to place the reasoning in conceptual context.

224 *The consequences of the Court of Appeal's reasoning.* The Court of Appeal considered that the failure to call Mr Robb meant that the evidence which ASIC called "suffers in its cogency"[188]. It "undermines the cogency" of ASIC's case[189]. It "counts against satisfaction on the balance of probabilities"[190]. It "tells against" it[191]. A consequence of the reasoning seems to be that there is to be a discounting or depreciation of the evidence which has been called by reason of the failure to call other evidence.

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187 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 350 [795].

188 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 344 [756].

189 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 347 [777]. See also at 339 [732], 344 [760] and 350 [796].

190 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 350 [795].

191 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 350 [795].

225 If the Court of Appeal's decision is correct, two results will certainly flow. First, penalty proceedings will increase in length and complexity, for regulatory agencies will attempt to satisfy their new duty by calling more, not less, evidence. It will be natural for them to err on the safe side. Testimonial discrimination will be replaced by testimonial bloat. Secondly, there will be immensely time-consuming debate, at trials and in appeals, about whether the duty has been satisfied. Justice must be done though the heavens fall, but these are grave evils. Are they necessary evils?

226 *Explanations for the Court of Appeal's reasoning.* Is the purpose of this alleged rule punitive – threatening regulatory agencies with a weakening of their cases to encourage compliance with a desired norm by way of both particular and general deterrence? Of course, some rules of evidence result in the exclusion of evidence for disciplinary purposes. But a rule discounting the weight of evidence which was properly obtained and which has been admitted would be a new and unusual technique in the law of evidence.

227 Is the alleged rule some unexpressed application of the principle omnia praesumuntur contra spoliatorem – all things are presumed against a wrongdoer? It is true that ASIC made a deliberate choice not to call Mr Robb. But ASIC was not a spoliator, unless a "duty of fairness" created a positive norm backed by this sanction.

228 The Court of Appeal's reasoning rests in part on the idea that penalty proceedings brought by ASIC have a serious character which attracts the *Briginshaw v Briginshaw*[192] standard reflected in s 140(2) of the *Evidence Act* 1995 (NSW) ("the Evidence Act")[193]. In proceedings of that kind, the Court said that it is necessary to discover the "true facts"[194]. ASIC's case must, said the Court, "represent the truth, in the sense that the facts relied upon as primary facts actually occurred."[195] And the "true facts" cannot be discovered unless every available witness has been called by ASIC. These references to "true facts" and "primary facts [that] actually occurred" may echo a passage in Deane J's judgment in *Whitehorn v The Queen* which the Court of Appeal quoted. He said that a prosecutor represents the State and must "act with fairness

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192 (1938) 60 CLR 336 at 361-362.

193 See above at [144] n 140.

194 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 347 [776].

195 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 335 [717].

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."[196] Deane J's language is not matched by other members of the Court in *Whitehorn v The Queen*. Thus Dawson J said[197]:

> "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."[198]

Further, it is not ASIC's duty to arrive at a final conclusion regarding the truth of the evidence it tenders about the facts in issue. ASIC must, after making proper inquiries, believe that it has reasonable and probable cause to institute the proceedings, and to tender the items of evidence said to support the "facts" alleged to be "true". But it is for the judiciary to decide what "actually occurred" and what "facts" are "true". Contrary to what the respondents appeared at times to submit, performance of that judicial task is not preconditioned on the performance of the same task by the executive.

229 *The conceptual context of the Court of Appeal's reasoning.* The principles stated by the Court of Appeal can be placed in conceptual context by comparing them with three other principles.

230 First, the Court of Appeal made it plain that it did not consider that ASIC had a duty to call available witnesses equivalent to that which the Crown has in a criminal prosecution. It held that its prior ruling in *Adler v Australian Securities and Investments Commission*[199] to this effect had not been overturned by *Rich v Australian Securities and Investments Commission*[200]. No application to this Court was made to overrule *Adler v Australian Securities and Investments Commission* on this point.

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196 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 334 [707]. See *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664; [1983] HCA 42.

197 *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.

198 See also *Re Ratten* [1974] VR 201 at 214; *Ratten v The Queen* (1974) 131 CLR 510 at 517; [1974] HCA 35.

199 (2003) 46 ACSR 504 at 647 [678].

200 (2004) 220 CLR 129; [2004] HCA 42.

231 However, on occasion the Court of Appeal wavered between rejecting and accepting an analogy with the prosecutor's duty. The duty recognised by the Court of Appeal and the prosecutor's duty are in truth quite different. When the prosecution does not comply with its duty to call witnesses, that "may constitute misconduct and may result in a miscarriage of justice", leading to the allowing of an appeal[201] and, commonly, an order for a new trial. But when ASIC fails to comply with the Court of Appeal's reasoning, the consequence apparently is not an order for a new trial. It is an adjustment – by discounting or depreciation – of the evidence that was received in the light of the failure to call other evidence. This adjustment is to occur in circumstances where the content of the untendered evidence may be a matter of legitimate doubt and speculation.

232 Secondly, the Court of Appeal accepted[202] that its reasoning went "beyond *Jones v Dunkel*"[203]. Indeed, it agreed with the trial judge's conclusion that the rule in *Jones v Dunkel* did not apply. As the Court of Appeal said, two consequences can flow from the unexplained failure of a party to call a witness whom that party would be expected to call. One is that the trier of fact may infer that the evidence of the absent witness would not assist the case of that party. The other is that the trier of fact may draw an inference unfavourable to that party with greater confidence. But *Jones v Dunkel* does not enable the trier of fact to infer that the evidence of the absent witness would have been positively adverse to that party[204]. The position in the United States is different[205]. In turn, that has evidently led to the imposition of stricter preconditions than those which exist under *Jones v Dunkel*. Thus McCormick says[206]:

> "The cases fall into two groups. In the first, an adverse inference may be drawn against a party for failure to produce a witness reasonably

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201 *Whitehorn v The Queen* (1983) 152 CLR 657 at 674.

202 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 350 [795]. See also at 339 [731] and 344 [760].

203 (1959) 101 CLR 298; [1959] HCA 8.

204 *HML v The Queen* (2008) 235 CLR 334 at 437-438 [302]-[303]; [2008] HCA 16; *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 385 [64]; [2011] HCA 11.

205 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1979), vol 2 at 192 [285].

206 Strong (ed), *McCormick on Evidence*, 5th ed (1999) at 407 ¶264. See also Stier, "Revisiting the Missing Witness Inference – Quieting the Loud Voice from the Empty Chair", (1985) 44 *Maryland Law Review* 137.

> assumed to be favorably disposed to the party. In the second, the inference may be drawn against a party who has exclusive control over a material witness but fails to produce him or her, without regard to any possible favorable disposition of the witness toward the party. Cases in the second group are increasingly less frequent due to the growth of discovery and other disclosure requirements."

The Court of Appeal did not hold that the United States position should be adopted, though Mr Shafron incorrectly contended that it corresponded with Australian law. In any event, Mr Robb fell into neither of McCormick's categories.

233 The doctrine on which the Court of Appeal relied went beyond *Jones v Dunkel* in causing the evidence tendered, not to be left unimproved, but to be discounted or diminished in its weight. Even if it applied, which it does not[207], *Jones v Dunkel* does not assist the respondents. An inference that Mr Robb's evidence would not have assisted ASIC in no way damages the strong impact of the minutes. And there were no inferences from other evidence which were adverse to ASIC and thus to be strengthened by Mr Robb's absence.

234 The third principle which is distinct from the Court of Appeal's reasoning is that the less evidence a party bearing the burden of proof calls, the more likely it is that that party will fail to satisfy its burden. That general statement is subject to qualifications. A party need not call certain types of evidence if the opposing party does so. There is no need for a party to call *all* available evidence, if what that party and the opposing party have called is sufficient. However, it is one thing to say that a party's failure to call available evidence prevents it from discharging the burden of proof. It is another thing to say that the failure to call available evidence results in a discounting of the evidence which was called.

235 It is convenient now to analyse the Court of Appeal's reasoning, first by reference to the duty of fairness, and then by reference to what might be called *Blatch v Archer*[208] analysis.

The duty of fairness

236 *The respondents' attitude to the "duty of fairness".* It is controversial whether any of the respondents asked the Court of Appeal to recognise a "duty of fairness" with all the consequences the Court of Appeal attributed to it. Certainly not all of them did. In this Court, the written submissions of the

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207 See below at [263]-[267].

208 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

Solicitor-General of the Commonwealth subjected the "duty of fairness" to very damaging criticism. The respondents, perhaps detecting a depressing odour of morbidity and impending failure in the largely unsolicited bounty that the Court of Appeal conferred on them, contended that the two strands of the Court of Appeal's reasons were distinct and independent. The respondents' written submissions either did not support recourse to the duty of fairness or downplayed it. Thus counsel for the Hellicar respondents said that "the primary (but not only) framework within which to review the availability of inferences was the principle in *Blatch v Archer*." But counsel advanced no argument in support of the "duty of fairness". Mr Shafron adopted the submissions of the Hellicar respondents. In addition, he submitted that "the finding of a breach of the obligation of fairness did not enable any inference to be drawn that would not, in any event, have been drawn pursuant to *Blatch v Archer*". Mr Shafron also submitted that the "existence of a duty of fairness [was] immaterial to the assessment of ASIC's evidentiary case [and] had no consequence beyond the ordinary application of the principle in *Blatch v Archer*." Mr Terry submitted that the alleged breach of the obligation of fairness "*reinforced*, rather than was the sole basis of, the [Court of Appeal's] finding that ASIC had failed to establish the critical factual issue to the relevant standard." (emphasis in original) He submitted that it was not necessary, in order to decide these appeals, to determine whether ASIC failed in an obligation to act fairly. Mr O'Brien and Mr Willcox adopted the submissions of the Hellicar respondents and those of Mr Terry. In oral submissions, counsel for the Hellicar respondents went further: they declined to submit that ASIC "acted unfairly", and they declined to submit that ASIC's failure to call Mr Robb caused "a discounting of the entire case". Counsel for Mr Terry, on the other hand, said that he "does not shy away from the Court of Appeal's reasoning" on unfairness.

237 The Court of Appeal's conclusion in relation to ASIC's duty to act fairly was avowedly novel. Their Honours said that in the context of enforcement proceedings by a regulatory agency, "the usual rules and practices of the adversary system may call for modification"[209], but they accepted that there "is … no case in which the failure to call a witness has been held to constitute a breach of the obligation of fairness."[210]

238 The Court of Appeal relied on three factors to support its conclusion that ASIC had an obligation of fairness, breach of which discounted and damaged the cogency of its case. The first was ASIC's obligation as a model litigant, said to

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209 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 335 [717].

210 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 333 [705].

be derived partly from the common law and partly from formal governmental statements. The second was the need to ensure a fair trial. The third derived from ASIC's powers and functions.

239 *ASIC as a model litigant.* ASIC did not dispute that it had an obligation to conduct proceedings fairly, as a model litigant. But it argued that that obligation did not create duties on it different from those which apply to other litigants in relation to the calling of witnesses in civil proceedings. ASIC accepted that there is, in the words of Griffith CJ, an "old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects"[211]. Its powers are exercised for the public good. It has no legitimate private interest in the performance of its functions. And often it is larger and has access to greater resources than private litigants. Hence it must act as a moral exemplar[212].

240 ASIC also did not dispute that it had a duty to act as a "model litigant" pursuant to the Legal Services Directions made under s 55ZF of the *Judiciary Act* 1903 (Cth). But App B of the Directions does not create any specific obligation of the kind which the Court of Appeal relied on. In any event, s 55ZG(3) of that Act provides that non-compliance cannot be raised in any proceeding except by or on behalf of the Commonwealth. The Commonwealth has the same rights as any other litigant[213]. It has the same powers to enforce those rights[214]. That is so whether the Commonwealth is suing or being sued. And it is so even where, as here, no other person could have brought the proceedings[215]. Nothing in the Legal Services Directions suggests that the Commonwealth's obligations as a model litigant extend to the question of which witnesses it should call. And nothing suggests that if the Commonwealth fails to call a particular witness, the evidentiary consequences are those that the Court of Appeal's reasoning contemplated. The Solicitor-General of the Commonwealth correctly submitted that the duty to act as a model litigant requires the

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211 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342; [1912] HCA 69.

212 ASIC accepted what was said on these points in *P & C Cantarella Pty Ltd v Egg Marketing Board for the State of New South Wales* [1973] 2 NSWLR 366 at 383; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 197; *Scott v Handley* (1999) 58 ALD 373 at 383 [43]-[45].

213 *Brandon v The Commonwealth* [2005] FCA 109 at [11].

214 *Wodrow v The Commonwealth* (2003) 129 FCR 182 at 195 [42]-[43].

215 Cf *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 339 [728].

Commonwealth and its agencies, as parties to litigation, to act fairly, with complete propriety and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants. But the procedural rules are not modified against model litigants – they apply uniformly.

241 *The need to secure a fair trial.* The second factor the Court of Appeal relied on was the need to secure a fair trial. The Court of Appeal began with the proposition that the principle of a fair trial is one of the most basic principles of the Australian legal system. It cited numerous authorities, mainly relating to abuse of process, to that effect. But why should the principle of a fair trial entail the consequences propounded in the Court of Appeal's reasoning? The Court of Appeal noted that the principle of a fair trial is the raison d'être for the prosecutorial duty to call witnesses. But it correctly denied that ASIC was subject to that prosecutorial duty[216]. The Court of Appeal also stated[217]:

> "the public interest can only be served if the case advanced on behalf of the regulatory agency does in fact represent the truth, in the sense that the facts relied upon as primary facts actually occurred. It is not sufficient for the purposes of, at least, most regulatory regimes that, in accordance with civil laws of evidence and procedure in an adversary system, one party has satisfied the court of the existence of the relevant facts. The strength and quality of the evidence advanced on behalf of the state is a material consideration, which has received acknowledgement in the case law."

The first sentence must be qualified. As discussed above[218], the regulatory agency need not do more, after making proper inquiries, than consider, with reasonable and probable cause, that its case represents "the truth". The second sentence is not correct: it is enough for ASIC to satisfy the court that facts sufficient for liability exist, albeit to a *Briginshaw* standard. As for the third sentence, the strength and quality of the evidence is material to whether the standard of proof is satisfied. But nothing more has been acknowledged in the case law.

242 *ASIC's powers and functions.* To support the role of a fair trial in advancing its reasoning, the Court of Appeal presented an analysis of ASIC's powers and functions. They are extensive. But the Court of Appeal did not explain how their "cumulative effect" justified the creation of a duty on ASIC to

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216 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 329 [678].

217 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 335-336 [717].

218 See above at [228].

call witnesses. As the Solicitor-General of the Commonwealth asked: "Is this an implication from the statutory scheme? Is it a rule of the common law? Is it a rule of evidence in particular?"

243 The only provision to which the Court of Appeal referred giving ASIC any greater power in the conduct of litigation (as distinct from pre-trial information gathering powers) is s 1317R of the Corporations Act. It gives ASIC a power to "require a person to give all reasonable assistance in connection with" a declaration of contravention or a pecuniary penalty order. But s 1317R(5) prevented that power from being invoked against Mr Robb, since he had been a legal representative of two defendants. Although the Court of Appeal referred to s 1317L of the Corporations Act, their Honours did not explain how that enactment could stand with its reasoning. It provides that in hearing proceedings like the present, seeking a civil penalty, the court "must apply the rules of evidence and procedure for civil matters". The section speaks of the rules that apply in ordinary suits between ordinary civil litigants. It leaves open no room for modifying those rules where the moving party is ASIC. Until the decision of the Court of Appeal under challenge, there was no rule of evidence or procedure in civil cases imposing a duty on ASIC to call witnesses. To create that rule was not only to change the common law, but to undermine the legislative regime requiring civil proceedings as the mode of trial for civil penalties. Had the legislation made civil penalties recoverable in criminal proceedings, the prosecutor's duty to call witnesses would have applied. But it made civil penalties recoverable in civil proceedings. That excludes any duty of that kind. The background to the civil penalty regime further supports that conclusion. This case concerns the enforcement of the law against directors and officers. Before provisions providing for the recovery of civil penalties for breach of directors' duties of care and diligence were enacted in 1993, the criminal law was applied – a fine of $200,000 or imprisonment for five years: Corporations Law, s 1311 and Sched 3. The substitution of civil penalties for criminal sanctions highlights the move away from criminal to civil procedure. This transition was later made explicit by s 1317L, which commenced in 2000. When in 2007 s 1349 of the Corporations Act removed the privilege against exposing oneself to a penalty, the relevant Explanatory Memorandum stated that that was to have "effect despite the Court being required to apply the rules of evidence and procedure for civil proceedings."[219]

244 *ASIC's compliance with rules securing a fair trial.* Section 1317L ensures that the rules of evidence and procedure in civil cases apply in actions for a penalty. In consequence, certain safeguards built into those rules ensure that trials conducted in accordance with them are fair. ASIC complied with the rules.

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219 Australia, House of Representatives, Corporations Amendment (Insolvency) Bill 2007, Explanatory Memorandum, at 83 [5.47].

It filed a detailed statement of claim. It provided particulars. It served affidavits and witness statements where that was possible. Where that was not possible it served lists of topics which it was expected the evidence would deal with. It provided the respondents with transcripts of all relevant examinations conducted under s 19 of the *Australian Securities and Investments Commission Act* 2001 (Cth), all evidence given to the Special Commission of Inquiry into the Foundation, and the whole of its database. ASIC's counsel opened its case at length. This gave the respondents a full opportunity to understand and meet that case. Mr Robb's cooperation with ASIC was incomplete. In part, this was because of James Hardie Industries Ltd and James Hardie Industries NV. Those companies prevented Mr Robb from assisting ASIC until the eve of the trial on the claimed ground that he owed them a duty of confidentiality. It was also because when Mr Robb provided material to ASIC well after the trial started, it was incomplete, unsigned and unsworn. However, ASIC waived privilege over it and provided it to all respondents. After deciding not to call Mr Robb as a witness, ASIC offered to call on a subpoena it had served on Mr Robb in order to ensure his attendance if the respondents desired it. Quite apart from that, even if Mr Robb was reluctant to confer with the respondents – the point is controversial – he was equally available to both sides to be called. Mr Terry submitted that ASIC had promised to call Mr Robb. Even if it had, it was not a binding promise. The respondents pointed to no detrimental reliance on the promise. No respondent appears to have made any submission to the trial judge or the Court of Appeal that the lateness of ASIC's decision not to call Mr Robb had any impact either on their own decision not to call him, or on the method by which they had cross-examined the ASIC witnesses. No respondent sought an adjournment in order to consider whether to call Mr Robb. ASIC made all its witnesses available for further cross-examination. Only one respondent accepted the offer.

245 These circumstances reveal that the rules of evidence and procedure in civil cases as applied in these proceedings afforded safeguards securing a fair trial. They reveal that the Court of Appeal's reasoning requiring ASIC to call Mr Robb was not justified.

246 The novelty of the Court of Appeal's reasoning is accentuated by a distinction the majority drew in relation to the content of the rule the obligation of fairness creates. Spigelman CJ and Beazley JA said: "A regulator is under no duty to call every bystander or eyewitness who could give relevant evidence."[220] Instead, their Honours said[221]:

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220 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 346 [770].

221 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 346 [769].

> "a possibility is not sufficient to require that [a witness] be called in the exercise of a duty of fairness on the part of the regulator. What is required is some basis for an inference that there was a significant degree of probability that the witness would have relevant knowledge."

The majority pointed to no words in any case or any statute or any accepted principle justifying these nuances.

247 *The respondents' conduct of the trial.* It is questionable whether, even if the Court of Appeal's reasoning is correct, it should have treated the supposed failure of ASIC to comply with it as decisive. That is because none of the respondents now seeking to uphold the correctness of the Court of Appeal's reasoning – faintly though they do this – advanced any submission to the trial judge during the trial proper that it either was or should be the law, until after the evidence had closed. Mr Terry applied for a stay of proceedings, during but independently of the trial proper. He did so only on the ground, not now pressed, that ASIC had the same obligation as a prosecutor to call material witnesses. And Mr Terry's submission in final address involved inviting the judge to depart from binding authority[222]. The decision of the Court of Appeal to uphold that authority was not challenged in this Court. Had any notice been given before the evidence in the trial closed that the respondents wished the trial judge to act on the reasoning the Court of Appeal later propounded, it would have been open to ASIC to call evidence explaining why it did not call Mr Robb. A prosecutor can do this from the bar table[223], but in a civil case any assertions of this kind should probably be given in evidence. ASIC's explanation must have been relevant, because the Court of Appeal's reasoning is based on fairness. Questions of fairness do not operate in the abstract, but by reference only to what is fair in the circumstances of a particular case. And ASIC was in a position to call evidence about what Mr Robb would have said. It did so in relation to Mr Terry's stay application. But there was no occasion for it to do so in relation to the main trial. Creating a new rule by judicial legislation necessarily involves legislating retrospectively. However, the pernicious effects of retrospectivity can be diminished if it is possible by evidence for the party adversely affected by the new rule to adjust to it. The respondents gave ASIC no such opportunity here. They should not be permitted to take advantage of that circumstance.

248 *What could Mr Robb have said?* The content of what Mr Robb would or could have said was relevant to whether ASIC had breached its "duty of

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222 *Adler v Australian Securities and Investments Commission* (2003) 46 ACSR 504 at 647-648 [677]-[680].

223 *R v Apostilides* (1984) 154 CLR 563 at 575; [1984] HCA 38.

fairness". That must be so, because the Court of Appeal stressed the need for ASIC's case to "represent the truth"[224] and to ensure that the proceedings "were determined on true facts"[225]. The Court of Appeal's reasoning apparently requires that the absent witness be "an available and important witness"[226]. On what basis could Mr Robb be called "important"? On what basis could he be described as able to give evidence relevant to a fact in issue? Why did the Court of Appeal say that he would "probably have knowledge" about what happened at the 15 February 2001 meeting[227]? And, to refer to the even more extreme submission of Mr Shafron, how could it be said that Mr Robb's "conduct and state of mind was of central importance to ASIC's case"? There is no material in evidence to suggest what Mr Robb knew or remembered or could have said. Apparently he did not take clear contemporaneous notes. A solicitor in his position would have attended innumerable meetings and dealt with countless clients in the period of more than seven years that elapsed between the 15 February 2001 meeting and the trial. All the directors who gave evidence said they had no recollection of events in which they were personally and directly involved. If so, why should Mr Robb, who was not a director but an independent professional, be likely to have any recollection of those events?

249 Had Mr Robb been called, there were three mutually exclusive possibilities about what he might have said. First, he might have said that he had an actual recollection that the minutes substantially corresponded with what happened. Secondly, he might have said that he could not remember what had happened, and that refreshment of his memory from the minutes did not revive actual recollection, thus causing his evidence not to rise above the minutes. Thirdly, he might have said that the minutes were false. Neither of the first two possibilities would have assisted the respondents' case or damaged ASIC's. The respondents' submission that ASIC should have called Mr Robb so that they could have cross-examined him to suggest that the minutes were false assumes that the third possibility was correct. Mr Robb had supervised the drafting of the minutes before the meeting. He had participated in the settling of the minutes after the meeting. He had charged for these activities. If he had admitted participation in the preparation of a false minute, he would have risked admitting

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224 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 335 [717].

225 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 347 [776].

226 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 350 [795]. See also, for similar expressions, at 329 [673] and 347 [775].

227 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 345 [766].

that he had aided and abetted criminal offences under ss 251A and 1308 of the Corporations Act: see *Criminal Code* (Cth), s 11.2. Cross-examiners setting for themselves the goal of eliciting admissions from Mr Robb that a most important part of the minutes was an elaborate lie and that he had aided and abetted the commission of crimes would have been possessed of the most boundless and heroic optimism. Not only would that outcome be inconsistent with the minutes and the surrounding circumstances, it would be contrary to Mr Robb's own interests in every way. It is, in fact, inherently very unlikely.

Blatch v Archer analysis

250 *The respondents' authorities.* The Court of Appeal's conclusion cannot be supported by reference to the first strand in its reasoning, resting on a duty of fairness. The respondents in this Court preferred to support the outcome on the second strand. It is based on the *Briginshaw* qualifications to the standard of proof on the balance of probabilities in proceedings of the present kind, as reflected in s 140(2)(a)-(c) of the Evidence Act. It is also based on the following passages. In *Blatch v Archer*[228] Lord Mansfield CJ stated:

> "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

In *G v H*[229] Brennan and McHugh JJ stated:

> "when a court is deciding whether a party on whom rests the burden of proving an issue on the balance of probabilities has discharged that burden, regard must be had to that party's ability to adduce evidence relevant to the issue and any failure on the part of the other party to adduce available evidence in response."

In *Ho v Powell*[230] Hodgson JA stated:

> "in deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision.
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> …

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228 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

229 (1994) 181 CLR 387 at 391-392; [1994] HCA 48.

230 (2001) 51 NSWLR 572 at 576 [14]-[15].

> In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so".

In *Shalhoub v Buchanan*[231] Campbell J stated:

> "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. This is an application of Lord Mansfield's maxim".

In *Whitlam v Australian Securities and Investments Commission*[232] Hodgson, Ipp and Tobias JJA stated:

> "the principle in *Briginshaw* calls attention 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. Although this is not the same as the obligation of the Crown to call available evidence in a criminal prosecution, we think it is fair to say that a person seeking such a finding does need to be diligent in calling available evidence, so that the court is not left to rely on uncertain inferences".

And in *Cook's Construction Pty Ltd v Brown*[233] Hodgson JA stated, in an ex tempore judgment:

> "where a party has to prove something and prima facie has available evidence that would directly deal with the question, a court will be very hesitant in drawing an inference in that party's favour from indirect and second-hand evidence, when the party doesn't call the direct evidence that prima facie it could have called, at least unless some explanation is given, or the circumstances themselves provide an explanation".

251 *The respondents' authorities analysed.* For various reasons these citations do not support the respondents.

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231 [2004] NSWSC 99 at [71]. This was followed in *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1 at 111 [440].

232 (2003) 57 NSWLR 559 at 592 [119].

233 (2004) 49 ACSR 62 at 69 [42].

252 First, statements of this kind often merely illustrate the rule in *Jones v Dunkel*. A good example is the passage in *Cook's Construction Pty Ltd v Brown*, which appears in the context of a discussion of *Fabre v Arenales*[234], a leading authority on *Jones v Dunkel*. Another is the passage in *Whitlam v Australian Securities and Investments Commission*, which counsel for Mr Terry correctly described as "a *Blatch v Archer*/*Payne v Parker* case". Another is the passage in *G v H*, for the proposition Brennan and McHugh JJ assert is immediately thereafter illustrated by a quotation from *Weissensteiner v The Queen*[235] that sets out the rule in *Jones v Dunkel*.

253 Secondly, not one of these passages asserts the Court of Appeal's proposition that a failure to call certain evidence leads to a discounting of the evidence actually called.

254 Thirdly, the references to "power" and "ability" do not deal with the present circumstances. Mr Robb was not within the control or in the camp of one side rather than another. Although Mr Robb may have given ASIC more cooperation than he gave the respondents, ASIC's power over Mr Robb was no greater than that of the respondents. In fact, it may have been less: the respondents were in a position to appeal to ancient loyalties and the companionship of past struggles.

255 Fourthly, the Court of Appeal seemed to doubt whether satisfying the standard of proof depends on the trier of fact's personal belief. Thus the Court of Appeal referred to the following statement in *Rejfek v McElroy*[236]:

> "proof of fraud should be clear and cogent such as to induce, on a balance of probabilities, an actual persuasion of the mind as to the existence of the fraud".

The Court of Appeal then stated[237]: "References in the authorities to 'actual persuasion' should be understood as equivalent to the state of 'satisfaction' … It should not be understood as requiring a subjective 'belief'." After seeking to

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234 (1992) 27 NSWLR 437 at 448-450.

235 (1993) 178 CLR 217 at 227; [1993] HCA 65.

236 (1965) 112 CLR 517 at 521 per Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ; [1965] HCA 46.

237 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 343 [750].

explain away the contrary opinions of others, their Honours stated[238]: "'persuasion' is not equivalent to 'belief'." Why not? In *Ho v Powell* Hodgson JA was stressing that fact finding on the civil standard of proof does not depend only on the comparison of probabilities in the light of limited evidence. But he was also stressing that it depends on actual persuasion – a state of personal belief. He was saying that that may be unattainable if the materials for decision are slight. His Honour's point, as expounded in his article[239] cited both in *Ho v Powell* and in *Whitlam v Australian Securities and Investments Commission*, was:

> "mathematical probabilities can be based on most general and scanty material, so that it may be unreasonable to act upon such probabilities; and, in particular, in our adversarial system, it may be unreasonable to act upon them where the party bearing the onus of proof does not make a reasonable attempt to lead evidence concerning the particular facts."

This was not a case in which the materials for decision were slight, general or scanty.

256 Fifthly, these cases, and *Shalhoub v Buchanan* in particular, merely point out that the greater the failure of a party bearing the onus of proof to call available witnesses with valuable evidence to give, the harder it is to satisfy that onus. The Court of Appeal appeared to accept as much when it said that its rule "takes matters beyond *Jones v Dunkel*, and beyond what was said in, for example, *Shalhoub*."[240] The cases illustrate nothing more than Dawson J's observation: "When a party's case is deficient, the ordinary consequence is that it does not succeed."[241] Counsel for the Hellicar respondents put the following submission about the principle stated in *Blatch v Archer*:

> "The underlying rationale for this principle can be simply put: a party with the burden of proof is expected to meet the requisite proof. If a party provides limited evidence when further evidence was available, a tribunal of fact is entitled to consider that failure when assessing whether the party has produced evidence to satisfy the standard of proof."

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238 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 343 [750].

239 Hodgson, "The Scales of Justice: Probability and Proof in Legal Fact-finding", (1995) 69 *Australian Law Journal* 731 at 732-733.

240 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 350 [795].

241 *Whitehorn v The Queen* (1983) 152 CLR 657 at 682.

That is correct. And counsel's submission that that rationale was recognised in *Ho v Powell* is also correct.

257 However, counsel for the Hellicar respondents submitted that the authorities quoted above support the view that where a witness who could have been called by a party is not called "the direct evidence of that party may be more readily rejected and the inferences for which that party contends may be treated with greater reserve". (This substantially quoted Glass JA's words in his reasons for judgment in *Payne v Parker*[242].) They also contended that the trier of fact could make "an assessment of the overall weight of the evidence unfavourable to that party." (This paraphrased part of Austin J's reasons for judgment in *Australian Securities and Investments Commission v Rich*[243].) The better reading of these propositions drawn from Glass JA's and Austin J's reasons is that the weaker one party's evidence, the less adequate that party's evidence as a whole may be to meet a burden of proof. Items of evidence can have a mutually reinforcing character even if they are not strictly corroborative of each other. They can have that character even if they are circumstantial only[244]. But the two quoted propositions do not support or correspond with the Court of Appeal's reasoning. The Court of Appeal did not hold that, in the absence of Mr Robb's evidence, a piece of evidence capable of giving rise to uncertain inferences only was insufficient to satisfy ASIC's burden of proof. Rather it held that an exact proof – the minutes – should be given discounted weight and reduced cogency because of Mr Robb's absence.

258 Members of this Court have suggested that *Blatch v Archer* is to be understood as operating against a party in relation to facts "peculiarly within [that party's] knowledge"[245] – a party who is "ordinarily … the person best able, and … often … the only person able, to give information"[246]. ASIC was not a party of that kind. No ASIC representative was present at the 15 February 2001 board meeting. All the respondents were, in person or by telephone. Mr Robb

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242 [1976] 1 NSWLR 191 at 201.

243 (2009) 75 ACSR 1 at 111 [440].

244 "It is of critical importance to recognise … that in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence": *R v Hillier* (2007) 228 CLR 618 at 637 [46] per Gummow, Hayne and Crennan JJ; [2007] HCA 13.

245 *Weissensteiner v The Queen* (1993) 178 CLR 217 at 228 per Mason CJ, Deane and Dawson JJ.

246 *Russo v Aiello* (2003) 215 CLR 643 at 647 [10] per Gleeson CJ; [2003] HCA 53.

provided no signed or sworn or complete statement. What he provided to ASIC was handed on to the respondents. There was no inhibition on any respondent who wished to call him.

259 *The conditions for invoking the "principle in Blatch v Archer".* The Hellicar respondents frequently referred to the "principle in *Blatch v Archer*". But in truth the conditions for the application of the "principle in *Blatch v Archer*" on which they relied were not different from those necessary to invoke the principle in *Jones v Dunkel*. Two of those conditions were not satisfied. The present appeals thus do not afford an occasion to establish how far, if at all, *Blatch v Archer* stands for any wider principle.

260 The Hellicar respondents submitted that ASIC's failure to call Mr Robb had two consequences.

261 The first consequence was that certain inferences which ASIC allegedly wished the trier of fact to draw:

> "should be treated with greater reserve and indeed, ultimately, should not be drawn:
>
> (a) that the [7.24am Draft Announcement] was handed to Mr Robb at the Board meeting and distributed generally to those in attendance at the Board meeting;
>
> (b) that there was discussion of the [7.24am Draft Announcement] at the Board meeting in the presence of Mr Robb and that discussion led to obtaining the Board's approval;
>
> (c) that Mr Robb and Mr Peter Cameron accepted the 'say so' of [the Chief Executive Officer] that the Foundation would be fully funded and this provided the reason why they remained silent and allowed the Board to approve the [7.24am Draft Announcement], which they were still considering suggesting changes to; and
>
> (d) in late March/early April, Mr Robb engaged in a considered activity of reviewing and settling the draft minutes to ensure their accuracy, thereby lending extra credibility to them."

262 The second consequence was that certain other inferences "should be more strongly drawn" from particular alleged facts, namely:

> "(a) it is most unlikely that Mr Peter Cameron and Mr Robb would have remained silent during the Board meeting if the Board had in fact been asked to approve the [7.24am Draft Announcement] Resolution;

(b) it is highly likely that either or both Mr Peter Cameron and Mr Robb would have informed the Board about their conversation with Mr Shafron and [the Chief Executive Officer before the meeting discussing whether there was full funding] had there been any discussion about the [7.24am Draft Announcement] at the Board meeting, and they would have indicated that [the company's solicitors] needed more time to consider potential changes to the draft;

(c) it is highly unlikely that Mr Robb would have participated in making substantial changes to the [7.24am Draft Announcement] immediately after the Board meeting without reference back to the Board if he had just observed the Board pass the [7.24am Draft Announcement] Resolution; and

(d) it is likely that in late March/April Mr Robb did not give the draft minutes of the Board meeting close attention; had he done so, he could not have missed the fact that they did not approve the [7.24am Draft Announcement] Resolution."

263 The Hellicar respondents submitted that these consequences depended on what was called "a *Blatch v Archer*/*Payne v Parker* analysis". In their submission, that analysis required three conditions to be satisfied. The first condition was that Mr Robb "would be expected to be called by ASIC rather than the defendants". The second was that Mr Robb's "evidence would elucidate a particular matter". The third was that Mr Robb's "absence is unexplained."

264 Those three conditions are among the conditions required by the *Jones v Dunkel* line of cases for application of the principle they state. *Payne v Parker*[247], which is a *Jones v Dunkel* case, restates them. The first two of the three conditions were not met.

265 As to the first condition, there was no reason to expect that ASIC, rather than the defendants, would call Mr Robb. The respondents sought to draw an inference that Mr Robb would not have remained silent if the board had been asked to approve the 7.24am Draft Announcement. As the Solicitor-General of the Commonwealth correctly submitted, the more the respondents contended that Mr Robb could not properly, and hence by inference did not, acquiesce in the approval of so misleading a document, the more they underscored the alignment of his interests with theirs. The eleventh and twelfth defendants were Mr Robb's clients. The other defendants were, or had been, directors or officers of one or both of those companies. If Mr Robb was in the camp of anyone other than

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247 [1976] 1 NSWLR 191 at 201.

himself, he was in the respondents' camp, not ASIC's. The fact that he had his own interests and those of his firm to protect did not place him in ASIC's camp.

266 As to the second condition, there was no demonstrated reason to think that Mr Robb's evidence would elucidate any particular matter[248].

267 Hence even if the principle in *Blatch v Archer*, whether as manifested in the rule in *Jones v Dunkel* or otherwise, is as extensive as the Hellicar respondents submitted, which was questioned above[249], it cannot apply to the present case.

268 The relevant "evidence … to be weighed" included the minutes. Those minutes were minutes of the directors' own doings. All the directors but Mr Willcox acknowledged them to be correct on 3 April. Mr Willcox's silence implicitly acknowledged their correctness. ASIC contended that the minutes were correct. It was in the respondents' power to have contradicted the minutes, and in a sense some of them did so. It was in the power of both ASIC and the respondents to call as witnesses other persons present in order to prove that what the minutes said was either correct or incorrect. Why should ASIC's failure to call any or all of those persons diminish the force of the minutes? The respondents never answered that question convincingly.

269 The Court of Appeal's reasoning in relation to the duty of fairness and its reasoning in relation to *Blatch v Archer* have been considered separately. Neither supports its conclusion. Nor is that conclusion supported if the two are considered in combination.

270 ASIC submitted, in effect, that the Court of Appeal's reasoning regarding the calling of Mr Robb was crucial to its decision to set aside the trial judge's conclusion that the board had approved the 7.24am Draft Announcement and hence to dismiss the proceedings. There is force in this submission. ASIC then submitted that accordingly there was no reason why the trial judge's finding should not be restored. However, with skill and earnestness, the respondents advanced various arguments for the view that the trial judge's conclusion was unsustainable independently of Mr Robb's position.

The nature of the respondents' case in answer to the minutes

271 The relevant minute was hearsay evidence that a resolution approving a proposed ASX announcement had been passed. But though hearsay, it was

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248 See above at [248]-[249].

249 See above at [250]-[259].

primary evidence. It was, in a sense, "testimonial" evidence, not circumstantial evidence. It depended on inference as little as if the persons who settled the minutes and were present at the 15 February 2001 meeting had given firsthand testimony of what they had heard and seen.

272 Apart from their evidence about non-recollection, the respondents met that primary non-circumstantial evidence by relying on various forms of circumstantial evidence from which they wished inferences to be drawn. They did so with a particular perception of ASIC's case in mind. ASIC's case, the respondents correctly submitted, was that directors approved an announcement corresponding with a particular text which had been tabled. The respondents submitted that ASIC had not proved that any "announcement to the ASX" had been tabled at the meeting. They submitted that the directors' approval of some themes which management was at liberty to communicate to the ASX in whatever form it chose was one thing. Approval of an "announcement to the ASX" was another. The former did not establish the latter. They submitted that settling and approving an announcement was not the business of the meeting. They submitted that the circumstances made it unlikely that the 7.24am Draft Announcement was circulated at the meeting. They submitted that the conduct of Messrs Cameron and Robb during the meeting was inconsistent with any approval being given to an announcement[250]. They submitted that the contradictions between the 7.24am Draft Announcement and other contemporaneous materials made its approval unlikely. They submitted that the conduct of management in making changes to the 7.24am Draft Announcement as it evolved into the Final ASX Announcement reveals a belief that it was at liberty to do so, and that that belief was inconsistent with a resolution approving the 7.24am Draft Announcement. They submitted that the minutes could be ignored. The many factual errors in them indicated that neither those who helped to prepare them – the Chairman, the Chief Executive Officer, others in management, Mr Robb – nor the directors who approved them on 3 April checked them with sufficient care to pick up the fact that no resolution approving any announcement had been passed.

273 It is now necessary to examine these arguments one by one.

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250 A question could arise as to the admissibility of this conduct, and other conduct, for the desired purposes. Its admissibility depends on whether the conduct is a "previous representation" which "it can reasonably be supposed" that the person who carried out the conduct "intended to assert" within the meaning of s 59(1) and (2A) of the Evidence Act, and, if not, whether the common law as stated by Parke B in *Wright v Doe d Tatham* (1837) 7 Ad & E 313 at 388 [112 ER 488 at 516] applies. The question was not raised by the parties and need not be discussed.

Was the key business of the meeting the decision on separation?

274 The Hellicar respondents submitted that the directors came to the 15 February 2001 meeting knowing that the key business was the decision on separation. They also came with information about a proposed communications strategy which would necessarily include an ASX announcement, but without being given its terms or told that they would be asked to approve it at the meeting.

275 The weakness in the submission is that the decision on separation and the communication of that decision to the ASX were inseparably linked. There was no sense in undertaking separation unless its virtues were effectively communicated. What happened at the meeting could, of course, cure the non-enclosure of any draft announcement with the papers.

276 Approval of a draft ASX announcement was part of the key business of the meeting for the following reasons. On 22 January 2001 a management preliminary work plan had contemplated that a press release would be "workshopped" before the next board meeting. Management also recommended to the board that an announcement be made on 16 February 2001 to coincide with the third quarter profit announcement and "establish a firm on-the-record position which we can then defend as required." As early as 7 February 2001 Mr Robb and other solicitors associated with him were working on draft minutes containing a minute about an ASX announcement. This work involved several drafts, all containing that minute. The last of these drafts before the meeting was sent by Mr Robb to Mr Shafron at 8.05am on 15 February 2001. Thus both anticipated that there would be approval of an announcement at the meeting, even though no draft of it was in the papers for the meeting and no draft had been checked by senior management or advisers.

Was anything tabled?

277 When Mr Baxter joined the meeting soon after it started, he had with him the 7.24am Draft Announcement. There were concurrent findings of the trial judge and the Court of Appeal to this effect. Those findings were copiously supported by evidence. The respondents do not now dispute those findings.

278 The Hellicar respondents submitted that Mr Baxter had good reasons for not "tabling", ie handing out or circulating, the 7.24am Draft Announcement at the meeting. One good reason was that since he had not followed the standard procedure in preparing it, it was not ready to be issued. Another was that it made claims inconsistent with other material in the papers for the meeting. This latter point overlaps with a later argument and will be dealt with in relation to it[251].

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251 See below at [283]-[284].

The respondents contended that the James Hardie group's standard procedure for preparing ASX announcements involved approval by management or legal advisers, UBS Australia, the Chief Executive Officer and perhaps the Financial Controller before referral to the board. This had not happened before the 15 February 2001 meeting. However, as just indicated[252], draft minutes prepared before the meeting with Mr Robb's input anticipated that there would be a resolution approving a draft announcement, even though its terms were not yet known. The procedure adopted was not unreasonable in view of the extreme urgency of what was being done. The procedure adopted does not point against the passage of a resolution as the minutes record. The same is true of a procedure which ASIC referred to but which the Hellicar respondents denied. Under that procedure, the Chief Executive Officer and the Chairman could change an approved announcement unless the Chairman thought it appropriate to return it to the board. Even if that procedure existed, non-compliance with it does not, in the circumstances of haste involved, point against a resolution. The need for haste also explains the failure to obtain consent from third parties mentioned in the ASX announcement.

279 There is positive evidence that Mr Baxter tabled the 7.24am Draft Announcement. Mr Robb's firm produced two identical copies of that document on discovery. BIL Australia Pty Ltd, an institutional shareholder of James Hardie Industries Ltd associated with Mr O'Brien and Mr Terry, also produced a copy of the 7.24am Draft Announcement. There was no satisfactory explanation given for the latter circumstance except distribution of the 7.24am Draft Announcement at the meeting. BIL Australia Pty Ltd cannot have received it before it was created at 7.24am. It is unlikely to have been sent to BIL Australia Pty Ltd or people associated with it after the meeting, for example through direct communication between the Chief Executive Officer and Mr O'Brien. That is because during the meeting the 9.35am Draft Announcement superseded it. And, contrary to the Court of Appeal's suggestion (which ASIC claimed and Mr Terry conceded had not been raised before that Court), neither Mr Terry nor Mr O'Brien was likely to have received it during the Jackson Inquiry in 2004. They had ceased to be directors of James Hardie Industries Ltd by May 2001. There is no evidence that they received any documents during that inquiry. Their counsel do not appear to have cross-examined Mr Baxter to suggest that he had delivered the document to them after the meeting. The five directors who gave evidence said that they did not retain their board papers: they either left them behind or shredded them. James Hardie Industries Ltd did not produce any copy of the 7.24am Draft Announcement, but that was because its practice was to destroy drafts of documents sent to the ASX and to retain only the final version. Its practice was also to destroy board papers left behind by directors. Thus James Hardie Industries Ltd cannot have sent it to BIL Australia Pty Ltd after the

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252 See above at [276].

Final ASX Announcement on 16 February 2001. Further, as early as 1.11pm on 15 February 2001, 21 minutes after the end of the board meeting, the draft announcement being circulated within James Hardie Industries Ltd was the 9.35am Draft Announcement. Mr Cameron, Mr Robb and people from BIL Australia Pty Ltd are unlikely to have obtained the 7.24am Draft Announcement after the meeting, since that version was no longer the operative document.

280 Mr Cameron, Mr Robb, Mr Terry and Mr O'Brien received the 7.24am Draft Announcement at the meeting. The other persons present therefore probably also received it. It was thus correct for the trial judge to find that it had been "tabled". It may not have been physically tabled by the Chairman. But it was tabled by being handed out with his acquiescence or on his suggestion, as Ms Hellicar said was normal practice.

Mr Cameron's doubts

281 The respondents contended that there was evidence that just before the board meeting Mr Cameron and Mr Robb raised a question with the Chief Executive Officer and Mr Shafron about whether the actuarial basis of the separation proposal was sound. (Mr Shafron advanced arguments against his participation in the conversation. It is not necessary to resolve this question, in relation to which there is no notice of contention.) The Hellicar respondents submitted that it was most unlikely that these solicitors would have allowed the meeting to approve the 7.24am Draft Announcement without interrupting and raising their concern. Their silence at the meeting suggested that they did not believe that any announcement was receiving final approval at the meeting.

282 This is not a sound submission. First, the idea that solicitors, even solicitors as respected as Mr Cameron and Mr Robb, were at liberty to interrupt the business of the meeting would depend on showing that they had been instructed to do this or that it was accepted practice at James Hardie Industries Ltd board meetings. In response to a request for evidence along these lines, counsel for Mr Terry pointed to evidence of the regard in which the solicitors were held and to evidence of what Mr Cameron said at the 17 January 2001 meeting. But this did not prove any relevant instruction or practice. Secondly, the Chief Executive Officer assured the solicitors that the Foundation would be fully funded. He repeated that assurance during the 15 February 2001 meeting under questioning from Mr Brown. It is likely that the solicitors accepted what the Chief Executive Officer said. They did not remove all references in their copies of the 7.24am Draft Announcement to the claim that the Foundation was fully funded. It was reasonable for the solicitors to accept what the Chief Executive Officer said: he was likely to have much greater knowledge of the technical actuarial issues than they did.

Contradictions between 7.24am Draft Announcement and other material

283 Mr Terry submitted that it is most unlikely that the board would have approved a public statement that conveyed an impression that all claimants would *certainly* recover, as the 7.24am Draft Announcement did. Certainty of recovery for all claims was at odds with the following material. First, the communications strategy set out in the papers for the 15 February 2001 meeting denied that certainty of that kind was possible. Secondly, in the previous year's accounts the public had been informed that the James Hardie group could not reliably measure its exposure to asbestos-related liabilities. Thirdly, the Chief Executive Officer had told the board in his 13 December 2000 memorandum: "it is not possible today to accurately estimate the total likely asbestos cashflows". Fourthly, it was submitted that the handwritten amendments to the copies of the 7.24am Draft Announcement pared back representations of certainty to "an expected sufficiency based on an actuarial estimate". Mr Terry further submitted that it is most unlikely that Mr Cameron and Mr Robb would have remained mute had the board formally resolved to approve the 7.24am Draft Announcement.

284 These submissions fail. As already noted, under Mr Brown's questioning regarding an impending public announcement, the Chief Executive Officer said at the meeting that he was "sure" there would be sufficient funds in the Foundation[253]. No-one disagreed. The trial judge found that Mr Brown was dissatisfied with the communications strategy stated in the 15 February 2001 meeting papers, as he had been in relation to the proposed questions and answers and the draft ASX press release provided with the 17 January 2001 meeting papers. He was dissatisfied because they did not convey certainty of funding. Accordingly, as the trial judge found, Mr Brown welcomed the proposed communications to the market, including an announcement to the ASX, which did indicate certainty of funding. The significance of Mr Cameron's and Mr Robb's silence at the meeting was discussed above[254].

"Correlation evidence"

285 The Hellicar respondents submitted that while Mr Brown gave evidence that "messages" suitable for dispatch to the market were discussed and approved in general terms, they were messages which management could implement as it thought fit. The board's approval of the messages did not amount to approval of an announcement along the lines of the 7.24am Draft Announcement.

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253 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199 at 234 [149]-[150].

254 See above at [281]-[282].

286 Mr Brown testified that the Chief Executive Officer gave an assurance at the meeting that the Foundation would be fully funded and that any announcement would communicate that message. He also testified that part of the communication to the market would be an announcement to the ASX. He also testified that it was "likely" that the Chief Executive Officer or Mr Baxter stated that various messages would be communicated. Each message corresponded with part of the 7.24am Draft Announcement. Mr Koffel gave evidence that these statements could have been made. On the basis of this evidence, the trial judge found that either the Chief Executive Officer or Mr Baxter had made statements to that effect at the meeting. His Honour found there was a "strong correlation" between these statements and the 7.24am Draft Announcement[255]. The Court of Appeal overturned that finding. It held that the correlation was only "weak"[256]. It described Mr Brown's evidence as involving speculation, not recollection. However, the evidence does appear to have been based on recollection, even if it was not a recollection which extended to the "specific terms" of what was said. In the last resort, what Mr Brown meant was a matter of judgment. It is the type of judgment which turns on nuance. Truth can lie in a nuance[257]. The trial judge saw and heard Mr Brown give evidence for five days. His possession of that advantage makes the assessment of nuance which led to his finding preferable to the Court of Appeal's rejection of it.

287 The Court of Appeal also considered that Mr Brown's impressions may have derived not from a discussion about the 7.24am Draft Announcement, but from a slide presentation at the meeting. Mr Brown excluded that possibility. Although Mr Terry submitted to the trial judge that Mr Brown's denial was incorrect, the trial judge was entitled to accept it.

288 The Court of Appeal also marginalised Mr Brown's evidence by questioning whether management would address the meeting by reference to the 7.24am Draft Announcement when the same points were made in the slides. But why could it not do so? Mr Baxter had distributed the 7.24am Draft Announcement. What was to be said to the ASX and the market had been a matter on which the 17 January 2001 proposal had foundered. It was legally necessary and commercially fundamental that something be said. It was urgent that something be said. Mr Brown regarded the messages in the slides as

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255 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199 at 240 [194].

256 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 288 [420].

257 *Biogen Inc v Medeva plc* [1997] RPC 1 at 45.

insufficient to remove shareholder concern about sufficiency of funding. Further, Mr Brown remembered the management speech as using the phrases "fully funded" and "certainty". He said they were "much clearer" than the phrases used in the slide presentation ("effectively resolved its asbestos liability", "expects to have enough funds", "much greater certainty").

The significance of the changes to the announcement

289 As the 7.24am Draft Announcement evolved into the 9.35am Draft Announcement and then eventually into the Final ASX Announcement, management made changes, in consultation, to some extent, with Mr Cameron and Mr Robb[258].

290 The respondents relied on the extent of the changes as evidence that no resolution had been passed. It is sufficient to say that most of them concerned trivial matters involving variations of expression and the correction of minor errors. The stated value of the Foundation's assets changed from $284 million to $293 million. This was not de minimis, but it was not significant. As the trial judge found, the Financial Controller of James Hardie Industries Ltd made the change in order to ensure that the amount corresponded with the extraordinary loss to be entered in the books of that company, which had to be determined at a risk-free discount rate. Another change centred on the introduction of the word "anticipated". Thus the 7.24am Draft Announcement said: "The Foundation will have sufficient funds to meet all legitimate compensation claims". The Final ASX Announcement said: "The Foundation *has* sufficient funds to meet all legitimate compensation claims *anticipated*" (emphasis added). Contrary to what Mr Baxter thought, this did not change the meaning of the paragraph and it was not significant. Each version spoke of the future, but using different words. The net effect of the changes was neutral. The same is true of another change of that kind to the eleventh paragraph. The 7.24am Draft Announcement and the Final ASX Announcement contained the same misrepresentations. Some of the changes concerned those misrepresentations, but they did not alter the fundamental meaning of what was said.

291 Mr Baxter's evidence was that it was open to management or to Mr Robb's firm to make changes to the announcement, so long as the Chief Executive Officer was consulted, and that he would expect the Chief Executive Officer to consult the Chairman, who would decide whether to consult the rest of the board. It was not clear whether the respondents' argument was that the making of *any* change to the 7.24am Draft Announcement showed that no resolution approving it had been passed. If so, it was unrealistic. Changes which were not substantial could be permissible, unless there were evidence of a contrary practice within

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258 See above at [17] and [82].

James Hardie Industries Ltd. Too substantial a departure from the letter of a resolution might attract later criticism and censure by members of the board. But even that would not negate the proposition that the resolution approving the 7.24am Draft Announcement had been passed. And it would not negate the proposition that the misrepresentations in the Final ASX Announcement had thereby been approved.

"Work in progress"

292 Mr Shafron and the Hellicar respondents relied on the Court of Appeal's characterisation of the 7.24am Draft Announcement as "a work in progress, with subsequent changes of significance", including those made by Mr Robb and his firm[259]. One flaw in this argument is that the changes were not relevantly significant. Another is that the submission attributes an inconsistency to the directors. They placed the full force of their testimony behind an absence or shortage of discussion. It is inconsistent to accept that there was substantial discussion, but only of a work in progress, particularly since the work in question had to be completed within the next 24 hours. Thirdly, the minutes are completely inconsistent with there being no more than indecisive discussion of a work in progress. Fourthly, there is in fact no testimonial support for the submission.

293 Mr Shafron relied on various items of his own conduct as capable of supporting the inference that he did not believe the board had approved the 7.24am Draft Announcement. The items in question are at best ambiguous. Mr Shafron's state of mind might more convincingly have been established by direct testimony. But he did not testify. And there is other conduct on his part pointing strongly against any belief that the board treated the matter as a work in progress only. He received drafts of the minutes recording the relevant resolution before the meeting, and they did not speak of a "work in progress". He circulated a draft of the minutes after the meeting, still recording the resolution in that form. He supervised the sending of that draft to the directors. And he was present when the directors approved it as correct at the 3-4 April 2001 meeting.

Errors in the minutes

294 The Court of Appeal accepted submissions by the respondents that there were errors in the minutes of the 15 February 2001 meeting, both in relation to the separation proposal and in relation to other matters. Those errors were certainly numerous. But they lack importance in these appeals. They do not

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259 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 350 [792].

suggest that the minute recording the tabling and approval of the 7.24am Draft Announcement was false. As ASIC submitted, the errors are qualitatively different from the wholesale inclusion of a resolution that never was. The former were points of detail which might escape attention on a re-reading of the draft minutes. The latter would be glaringly obvious to any reader – and to at least one of the Chairman, the Chief Executive Officer, Mr Morley, the non-executive directors, Mr Shafron and Mr Robb.

295 The respondents seek to infer from the errors in the minutes as a whole that the minute recording the tabling and approval of the 7.24am Draft Announcement is false. There is a problem in that reasoning. If it were sound it would follow that everything else in the minutes is false and the "separation proposal" never took effect. The respondents' enthusiasm for attacking the accuracy of the minutes in detail brought them, as Mr A J L Bannon SC, who presented ASIC's oral argument in reply, submitted, "adventurously close" to the view that the separation resolutions themselves were not passed. Although Mr O'Brien advanced a radical submission to that effect, to be considered below[260], in the end, the other respondents did not go that far. They challenged only the resolution approving the 7.24am Draft Announcement. But if the separation resolutions were passed, the directors must have thought, after the Chief Executive Officer's assurance to Mr Brown, that there was sufficient funding. And all of the directors must have appreciated the important need for a communication to the ASX satisfactory to troubled and hostile stakeholders in that respect. The board papers were replete with references to this. It was commercially vital. It is thus probable that they agreed to a communication sending that message to the ASX.

The provenance of the minutes

296 The respondents submitted that because the minutes were drafted before the 15 February 2001 board meeting they could not be treated as an accurate record of what happened. They were a prediction. The Chairman did not use them as an aide-mémoire to guide the meeting through the business. Hence it could not be concluded that the Chairman caused the meeting deliberately to fulfil the prediction. And they were not the result of someone taking careful notes, minute by minute, of what was actually said and done at the meeting, which is the mundane technique of many thousands of organisations much less august than the board of James Hardie Industries Ltd. Mr O'Brien put a more extreme submission. He submitted that the meeting only achieved a very general consensus about separation, and that thereafter the management selected for itself one of a variety of ways of giving effect to that consensus. Hence the purpose of the changes to the minutes was merely to ensure their conformity with decisions

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260 See below at [296]-[303].

taken by management after the meeting, not decisions taken by the directors during it.

297 These arguments, both in the narrower form and in Mr O'Brien's, have two flaws.

298 One is that those who drafted the minutes before the meeting knew what had to happen at the meeting if catastrophe were to be avoided. It would have been catastrophic to continue with non-separation when a new accounting standard was about to be introduced. The directors knew that too. The other is that although the minutes were drafted before the meeting, persons present at the meeting checked them afterwards – the Chief Executive Officer, the Chief Financial Officer, Mr Shafron and Mr Robb. In the course of that process the draft minutes were changed. Further, the gentlemen who prepared the minutes knew that the directors were supposed to check them before approving them as a correct record on 3 April 2001. There was evidence that one director never read minutes and that other directors read them only in part, or flicked or skimmed through them. But those who prepared the minutes did not know this. For all they knew, failure on their part to correct what the minutes said about the resolution might attract criticism. This guaranteed that some care would be taken by those who prepared the minutes.

299 By 21 March 2001 amendments had been made to the draft minutes in the light of what had occurred at the meeting. One amendment referred to the tabling of a financial model. Another concerned the tabling of counsel's advice (delivered the previous day). If these changes were made in order to ensure that the minutes conformed to what had actually happened, why was the resolution approving the 7.24am Draft Announcement, which on the respondents' case had not happened, not removed?

300 The following submission of the Hellicar respondents discloses the unreality of the arguments from error in the minutes and from the provenance of the minutes:

> "[T]he final minutes adopted in April were no more than an exercise carried out by Mr Shafron or someone else at [James Hardie Industries Ltd] five weeks after the Board meeting seeking to capture what had earlier occurred. The critical failing in what was done here was that the drafter of the minutes took as a starting point the draft which had been circulating prior to the Board meeting but which had never found its way to the Board meeting as a template against which the Board meeting was conducted. The drafter thus assumed, erroneously, that it was appropriate to prepare minutes which broadly assumed the actual Board meeting had followed the detailed logic and structure of the pre-meeting draft minutes, whereas in fact it had never proceeded in this way. While some changes were made to the pre-meeting draft minutes to capture certain aspects of

> the reality of the Board meeting, the end result was not a substantially accurate reflection of the way the Board meeting had been conducted or of the resolutions which had been adopted. In this process, the anticipation that there might have been a resolution by the Board specifically approving an announcement which was tabled at the Board meeting was retained quite erroneously."

301 But why was it wrong for the "drafter" to assume that the actual meeting had followed the logic and structure of the pre-existing draft minutes? All relevant persons knew, before, during and after the meeting, that separation depended on carrying out a series of complex technical steps. Those steps were faithfully recorded in the draft minutes and in the final minutes. The last step, as important as any that preceded it, was to comply with James Hardie Industries Ltd's obligation to make an ASX announcement. That is why the resolution appears in the minutes.

302 Further, the submission quoted above overlooks the following facts. Mr Shafron considered the minutes after 15 February 2001 and he attended both that meeting and the 3-4 April 2001 meeting, as did the Chairman, the Chief Executive Officer and the Chief Financial Officer. Mr Robb both prepared the pre-meeting drafts and considered the draft after the meeting. It would be too great a coincidence if not one of these able and experienced people failed to notice the commission of what on the respondents' case was a glaring blunder, or worse than a blunder – recording a vitally important resolution which never took place.

303 This suggests a further unreality in the respondents' case. If there had been no resolution approving an ASX announcement, that fact would have been known to all persons present. The respondents' case assumes that management and Mr Robb, after seeking to comply with the ASX Listing Rules by issuing the Final ASX Announcement, realised that the board had not approved it. Management, on that case, then fabricated a minute recording a resolution, in the sense of adopting the resolution stated in the pre-meeting draft documents which had no basis in fact. That was an extremely risky fabrication, for it assumed that no-one on the board would read the minutes before approving them, or that all directors would forget that they had not approved one of the most important announcements in the company's history.

Mr Gillfillan and Mr Koffel

304 Mr Gillfillan and Mr Koffel were in the United States during the meeting of 15 February 2001, but were in telephonic contact.

305 The trial judge found that by their silence Mr Gillfillan and Mr Koffel voted in favour of the resolution approving the 7.24am Draft Announcement. The Court of Appeal declined to interfere with that finding. Before the Court of

Appeal they argued that their conduct did not manifest an intention to exercise a vote. They argued that the board papers did not contain a draft resolution; they did not receive a draft resolution by other means; they were not provided with a copy of the 7.24am Draft Announcement and it was not read out; the "approval" came from discussion at the meeting only; they were silent; and there was no resolution or statement that silence counted as an affirmative vote. The Court of Appeal rejected these submissions[261]:

> "Messrs Gillfillan and Koffel participated in the meeting, albeit by telephone, and the principal business of the meeting was the establishment of the foundation and all it entailed. On the assumption that the … resolution [approving the 7.24am Draft Announcement] was passed, it cannot sensibly be concluded that they did not vote, even if by silence, in favour of establishment of the foundation, for which also there were no draft resolutions. On the same assumption, there is no sound reason to regard announcement of the establishment of the foundation as outside their concurrence by silence.
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> On the assumption of consideration and approval of the draft news release, Messrs Gillfillan and Koffel understood that [James Hardie Industries Ltd] proposed to issue an announcement, including on the contentious matter of funding, if the separation was approved. On the same assumption, the discussion would have disclosed that the other directors had a document they did not have. At the least they would have heard an extensive discussion, and a time would have come when, according to the practice, [the Chairman] summarised the position. By remaining silent, they joined in the informal resolution.
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> It may be added that, still on the assumption we have made, the minutes of the February meeting were relevantly a correct record, adopted by Messrs Gillfillan and Koffel among others. The minutes did not record abstention from the ... resolution [approving the 7.24am Draft Announcement]."

306 In this Court, the arguments of counsel for Mr Gillfillan and Mr Koffel centred on the submission that there was a great difference between the separation proposal and the 7.24am Draft Announcement. They had ample materials in relation to the former, and they were on clear notice that its consideration was a central purpose of the meeting. They had no materials or notice in relation to the latter. Counsel submitted that the evidence of what happened in the meeting was insufficient to suggest that the 7.24am Draft Announcement, which had not been sent or read out to them, was being raised

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261 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 364 [855]-[857].

for approval. Counsel argued that the general practice at James Hardie Industries Ltd board meetings that silence meant consent applied only where what was being decided was clear to all. The silence of Mr Gillfillan and Mr Koffel was an abstention.

307 The Court of Appeal's conclusions in relation to Mr Gillfillan and Mr Koffel were correct. Whether they read the minutes of the 15 February 2001 meeting or not, they approved them, in company with every other director save the absent Mr Willcox, on 3 April 2001. They did not then indicate that they had abstained from voting. The board's practice was that the Chairman could summarise a position and, unless any directors stated opposition, that was taken to be a unanimous board resolution. In their evidence Mr Gillfillan and Mr Koffel accepted that this was the board's practice. Further, Mr Gillfillan and Mr Koffel were on notice that a public announcement would be made at the same time as the third quarter results were announced if the 15 February 2001 meeting approved the separation proposal. That notice came from the board papers for both the 17 January 2001 meeting and the 15 February 2001 meeting.

308 Given the activity of management and directors in the months before February 2001, it would have been as obvious to Mr Gillfillan and Mr Koffel as to any other director that the separation proposal was potentially controversial to a degree. The vital need to communicate to the public that the Foundation would have sufficient funding to meet all legitimate claims would have been equally obvious. During cross-examination, Mr Gillfillan and Mr Koffel each accepted that they could have heard a discussion during the meeting about the fact that there would be an announcement about separation. They also each accepted that they knew that James Hardie Industries Ltd proposed to issue an announcement about the sufficiency of funding if the board approved the separation proposal.

309 If the question whether a director's silence indicates a favourable vote depends on the director's intention, the circumstances permitted an inference that each of Mr Gillfillan and Mr Koffel intended to approve the announcement discussed. If, on the other hand, the question whether a director's silence indicates a favourable vote depends on what a reasonable observer would think, taking account of what each of Mr Gillfillan and Mr Koffel must have heard of the consideration and approval given to an announcement, that observer would have taken them to be voting for approval.

310 Counsel also submitted that even if Mr Gillfillan and Mr Koffel had voted for the resolution, they were not in breach of the duty of care and diligence that s 180(1) of the Corporations Act created. They submitted that they gave careful attention to what was before them. They submitted that they had no duty of care and diligence to attend to anything more unless the Chairman ensured that they had more.

311 The following matters are relevant to an assessment of that submission. Mr Gillfillan and Mr Koffel appreciated that a significant announcement was to be made on the controversial subject of whether funding could be assured. The onus was on them to be cautious when voting on the making of the announcement – either by seeking further information or by explicitly abstaining. They gave evidence that if they had known the terms of the announcement approved, they would not have voted for it. This does not sit well with their conduct in leaving to other directors the task of devising the announcement. The submission must be rejected.

Orders

312 In ASIC's appeal in relation to Mr Brown it requests the following orders: that the appeal be allowed with costs; that the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 December 2010 in relation to Mr Brown be set aside; that in lieu thereof his appeal to that Court against the declaration made on 27 August 2009 be dismissed; that he pay one-eighth of ASIC's costs in the Court of Appeal in relation to the resolution approving a draft ASX announcement; and that the balance of Mr Brown's grounds of appeal concerning relief from liability and penalty be remitted to the Court of Appeal for determination. Those orders should be made.

313 The same orders were requested in relation respectively to Mr Gillfillan, Ms Hellicar, Mr Koffel and Mr Willcox. They should be made.

314 The same orders were requested in relation to Mr O'Brien and Mr Terry. They too should be made. There should be an additional order remitting to the Court of Appeal the question of whether the costs order referred to in ground 12 of their Notices of Appeal was correct.

315 In ASIC's appeal in relation to Mr Shafron, the following orders were requested: that the appeal be allowed with costs; that order (b) made by the Court of Appeal on 17 December 2010 in relation to Mr Shafron be set aside; that in lieu thereof Mr Shafron's appeal against declaration 1 made on 27 August 2009 against him be dismissed; that declaration 2 made against him on 27 August 2009 be set aside; that he pay one-eighth of ASIC's costs in the Court of Appeal in relation to the resolution approving a draft ASX announcement; that order 2(a)-(d) made by the Court of Appeal on 6 May 2011 in relation to Mr Shafron be set aside; and that the balance of Mr Shafron's grounds of appeal and ASIC's cross-appeal to the Court of Appeal concerning penalty be remitted to that Court for determination. Those orders should be made.