IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B29 of 2019

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**

Appellant

and

MICHAEL CHRISTODOULOU KING

First Respondent

and

ACN 101 634 146 PTY LTD (IN LIQUIDATION)

Second Respondent

APPELLANT'S SUBMISSIONS

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PART I: CERTIFICATION

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

PART II: ISSUES

2. The sole issue in this appeal is whether the Court of Appeal (**QCA**) erred in its construction of the definition of "officer" of a corporation in s 9 of the *Corporations Act 2001* (Cth) (**CA**) by concluding that, for ASIC to establish that the first respondent (**Mr King**) was an "officer" of the second respondent (**MFSIM**),[1] it was necessary for ASIC to prove that Mr King acted in an "office" of MFSIM, in the sense of a "recognised position with rights and duties attached to it" (**CAB 552-553** at [246], [249]).

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

3. No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: CITATIONS

4. First instance (contravention reasons): [2016] QSC 109; 308 FLR 216, **CAB 5 (Vol 1)**.

5. First instance (penalty reasons): [2017] QSC 96, **CAB 354 (Vol 1)**.

6. Court of Appeal (contravention appeal): [2018] QCA 352, **CAB 482 (Vol 2)**.

7. Court of Appeal (penalty appeal): [2019] QCA 121, **Supp CAB 4**.

PART V: RELEVANT FACTS

8. ***MFS Ltd, MFSIM and their facilities:*** MFS Ltd was the parent company of the MFS Group of companies (the **MFS Group**), which in 2007 comprised a multitude of companies that fell broadly into two categories: tourism and travel-related businesses (the **Stella Group**); and funds investment and financial services businesses, including registered managed investment schemes (**CAB 497** at [2]).[2]

9. The Premium Income Fund (**PIF**) was one of the registered managed investment schemes in the MFS Group. MFSIM was the responsible entity for PIF. PIF was MFSIM's "flagship fund"; as at 31 October 2007, it had total funds under management of approximately $787 million. PIF invested retail investors' funds in equities, debt instruments, cash and registered mortgages, and investors would receive monthly distributions (**CAB 497** at [3]).

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1 ASIC filed a cross-appeal in the proceeding below that named MFSIM as a party. It has therefore been named as a party in this appeal. On 6 June 2019, it filed a submitting appearance.

2 MFS Corporate structure (**AFM 4**).

10. On 29 June 2007, MFSIM, as responsible entity for PIF, entered into a $200 million facility with the Royal Bank of Scotland plc (**RBS**) (the **RBS Loan Agreement**) for the purposes of PIF (**CAB 497** at [4], [5]).

11. On 1 June 2007, for purposes unrelated to PIF, MFS Castle Pty Ltd (a wholly-owned subsidiary of MFS Ltd), entered into a short-term loan facility with Fortress Credit Corporation (Australia) II Pty Ltd (**Fortress**) for $250 million (**Fortress Loan**). The loan was guaranteed by MFS Ltd and another wholly-owned subsidiary of MFS Ltd, MFS Financial Services Pty Ltd. The whole $250 million was drawn down on 1 June 2007. The loan was to be repaid by 31 August 2007. In the meantime, MFS Ltd hoped to sell the Stella Group or finalise a $450 million corporate banking facility to enable the Fortress Loan to be repaid by its due date. That did not happen, and the Fortress facility was extended to 30 November 2007 (**CAB 497** at [6]).

12. ***November 2007 payments:*** In late November 2007, Mr King was an executive director of MFS Ltd and Chief Executive Officer (**CEO**) of the entire MFS Group (**CAB 499** at [19], **CAB 536** at [182]). Mr King negotiated terms with Fortress to defer repayment of the total amount of the Fortress Loan, which required a payment of $100 million together with a $3 million extension fee by 30 November 2007, with the balance of $150 million to be repaid by 1 March 2008. This "eleventh hour agreement" required MFS Ltd to find $103 million to repay Fortress by 30 November (**CAB 497** at [8]).

13. On 27 November 2007, MFSIM drew down $150 million under the RBS Loan Agreement. On 30 November 2007, $130 million of that $150 million was paid by MFSIM to MFS Administration Pty Ltd (**MFS Administration**) (which acted as the group's treasury company) and, in turn, on the same day MFS Administration paid $103 million of the $130 million to Fortress (**CAB 498** at [9] and [11]). In that way, the payment required to be made to Fortress on 30 November 2007 was made from funds ultimately drawn from the RBS facility.

14. ***Use of the monies paid:*** The primary judge and the QCA were satisfied that MFSIM had misused the $130 million that belonged to PIF. PIF (and indirectly investors in that managed fund) received nothing in exchange for the payment out of that money, and were exposed to the risk that PIF's money would not be restored to it, leaving PIF without even an evident promise of repayment, let alone one that was properly secured. MFSIM was found to have breached its duties as PIF's responsible entity and to have thereby contravened s 601FC(1) (**CAB 498** at [13]-[14]), and also to have provided a

financial benefit to a related party in contravention of s 208(1) CA (**CAB 516-517** at [101]).

15. ***ASIC's case against Mr King:*** ASIC advanced two primary cases against Mr King at trial: first, that he was knowingly concerned in MFSIM's contraventions of ss 601FC and 208 CA; and, second, that he had direct liability as an officer of MFSIM under s 601FD. As to ASIC's first case, Mr King was found at trial and on appeal to have had the requisite knowledge of the essential elements of MFSIM's contraventions of ss 601FC and 208, and to have been knowingly concerned in MFSIM's contraventions in respect of the November 2007 payments (**CAB 545** at [229]). That is not now in issue.

16. This appeal relates to the second way in which ASIC put its case. ASIC argued that, despite his resignation as director of MFSIM on 27 February 2007 (**CAB 499** at [19]), Mr King was an "officer" of MFSIM, being a person "who has the capacity to affect significantly the corporation's financial standing" (defn s 9, para (b)(ii)), including because he:

    (a) remained CEO and executive director of MFS Ltd until 21 January 2008 (**CAB 499** at [19]-[20]), in which capacity he was the most senior officer within the MFS Group and effectively the CEO of the entire MFS Group (**CAB 536** at [182]);

    (b) remained involved in MFSIM (**CAB 499** at [19]; **CAB 553-562** at [250]-[285]), such that he had "overall responsibility for MFSIM" (**CAB 499** at [19]);

    (c) spoke daily with Mr White, the Deputy CEO of MFS Ltd and an ongoing executive director of MFSIM (**CAB 554** at [253]); and

    (d) gave instructions/directions to Mr White on "proprietary matters" of MFSIM's business (**CAB 499** at [19]).

17. Mr King's capacity to affect significantly MFSIM's financial standing was evidenced most clearly by his involvement in the $103 million payment to Fortress. Mr King negotiated the variation to the agreement with Fortress by which that payment was to be made (**CAB 533** at [169]). He was in frequent contact with others within the MFS Group, most importantly Mr White, about the progress of Mr White's efforts to procure the finance by which that payment could be made (**CAB 533** at [169]). He encouraged Mr White and others to obtain the RBS funds for the purpose of making the Fortress payment (**CAB 533** at [169]). Mr King knew of the absence of a transaction by which a

benefit would pass to PIF by the time the $130 million payment by PIF was made (**CAB 545** at [228]).

18. Mr King "approved and authorised" the use of money drawn down under the RBS Loan Agreement to make the $130 million payment to MFS Administration, and in turn the $103 million payment to Fortress (**CAB 193** at [845] (QSC); **CAB 531-532** at [163] (QCA)). The QCA discerned no error in the reasoning which led the learned primary judge to conclude that "Mr White would not have caused PIF's money to be used in this way without the imprimatur of Mr King" (**CAB 531-532** at [163]).

19. The primary judge was satisfied that Mr King was an "officer" of MFSIM as the responsible entity of PIF (**CAB 152** at [677]-[679]) and that he had breached his duties as an officer in contravention of s 601FD(1)(a), (c), (e) and (f) (**CAB 194** at [848]; **CAB 195** at [854]).

20. By contrast, the QCA held that Mr King ought not to have been found to have contravened s 601FD(1), on the basis that he was not an "officer" of MFSIM (**CAB 552-553, 563** at [246], [249], [289]). The correctness of that finding is the sole issue raised by this appeal. Had the QCA found that Mr King was an officer of MFSIM, it would have concluded that he breached his duties under s 601FD (**CAB 563** at [289]).

PART VI: ARGUMENT

Summary

21. ASIC alleged that Mr King was an officer of MFSIM because he was a person who had the capacity to affect significantly MFSIM's financial standing, and therefore fell within paragraph (b)(ii) of the definition of "officer" in s 9 (**CAB 545-548** at [230], [232]).

22. The primary judge upheld that contention, but the QCA rejected it. Its legal reasons for doing so were relatively brief. Essentially, the QCA held that in order for ASIC to prove that Mr King was an officer of MFSIM within paragraph (b)(ii) of the definition, it had to prove that Mr King acted in an "office" of MFSIM, in the sense of "a recognised position with rights and duties attached to it" (**CAB 552-553** at [246], [247] and [249]). That finding closely reflects the observations of Lindley LJ in *In re Western Counties Steam Bakeries & Milling Co*, on which the QCA relied (**CAB 549** at [240]). There, his Lordship observed that "to be an officer there must be an office" and that "an office

imports a recognised position with rights and duties annexed to it".[3] Justice Mason referred to those observations in *Corporate Affairs Commission v Drysdale*,[4] as did the Full Federal Court in *Grimaldi v Chameleon Mining NL (No 2)* (**Grimaldi**).[5] It is noteworthy, however, that in *Western Counties*, the issue before the Court of Appeal was whether two accountants, who were engaged by the directors of the relevant company to prepare a balance sheet, were "officers" of that company within s 10 of the *Companies (Winding Up) Act 1890* (UK).[6] Critically, the term "officer" was not defined in that Act. As such, Lindley LJ made his observations about the word "officer" in a context where his reasoning was directed to the ordinary meaning of the word. Those observations are of no real assistance in the present context, given the exhaustive definition of the term "officer" in s 9. In particular, it is obviously circular and impermissible to construe a definition by reference to the term defined,[7] yet that is what would be involved in limiting the definition of "officer" by reference to the undefined meaning of that word.

23. In any event, the ordinary meaning of the word "officer" could only have been relevant if that word had a settled and precise meaning (being the meaning ascribed to it by Lindley LJ). But, as Gleeson CJ pointed out in *R v Scott*: "[t]he word 'officer' is not one of fixed or precise denotation. Its meaning and signification vary according to the context."[8] As such, in circumstances where paragraph (b) of the definition of officer must be read as extending beyond the identified "offices" that are referred to in the other paragraphs of the definition, there was no warrant for confining that paragraph by reference to some conception of the meaning of the word drawn from outside the exhaustive definition.

24. In summary, ASIC submits that the reasoning summarised above involved error, for the following four reasons.

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3 [1897] 1 Ch 617 at 627 (***Western Counties***).

4 (1978) 141 CLR 236 at 242 (***Drysdale***).

5 (2012) 200 FCR 296 at 316 [37] and 324 [72] (Finn, Stone and Perram JJ).

6 Which relevantly provided that "[w]here any director, manager, liquidator or other officer of the company" had done certain acts, that person may be proceeded against by way of a misfeasance summons.

7 *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419 (the Court), referring to *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, the relevant passages being at 507 and 509 (Gibbs J). See also *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at 628 [48] (French CJ, Kiefel, Bell and Keane JJ); *ICAC v Cunneen* (2015) 256 CLR 1 at 21 [33], 29 [60] (French CJ, Hayne, Kiefel and Nettle JJ).

8 (1990) 20 NSWLR 72 at 77 (Hunt and Allen JJ agreeing). As Gleeson CJ explained (at 78), the same term, in a different statutory context, has also been interpreted, again by the Court of Appeal in England, to mean "a person in a managerial situation in regard to the company's affairs" or "any person who in the affairs of the company exercises a supervisory control which reflects the general policy of the company for the time being or which is related to the general administration of the company…": citing *In Re A Company* [1980] 1 Ch 138 at 143 (Lord Denning MR) and 144 (Shaw LJ).

25. *First*, nothing in the text of either paragraph (b)(ii) of the definition of "officer" or s 601FD(1) requires the implication of a restrictive criterion of the kind discerned by the QCA. Nor does the broader statutory context support such a construction.

26. *Second*, the QCA erred in reasoning from the premise that, on a literal construction of the text of paragraph (b) of the definition of "officer", a person who is unrelated to the management of a corporation may be subjected to the burdens of the provisions of the CA with respect to officers. The QCA failed to appreciate that any such person must also answer the statutory description of being "of" the relevant corporation, which indicates a relationship of belonging or affiliation between the person falling within the definition of the term "officer" and the relevant corporation.

27. *Third*, the legislative history supports a construction of paragraph (b)(ii) which does not require that a person act in an "office" of the relevant corporation.

28. *Fourth*, the protective purposes of the relevant provisions of the CA do not support the QCA's narrow construction of paragraph (b)(ii) of the definition.

A. Consideration of statutory text and context

29. The task of statutory construction must begin with a consideration of the statutory text.[9] The relevant part of ASIC's case against Mr King was that he contravened s 601FD(1).[10] That provision sets out various duties of an "officer of the responsible entity of a registered scheme".[11] The relevant responsible entity, MFSIM, is a corporation (as it must be: s 601FA). As such, in determining whether Mr King was an "officer" of MFSIM within the meaning of s 601FD(1), attention must be directed to the dictionary in s 9, which provides that "***officer*** of a corporation" has the meaning set out in that definition, "[u]nless the contrary intention appears".

30. ***Text of the definition:*** Three features of the text of that definition are relevant. *First*, that which is the subject of the definition is not the composite expression "officer of a corporation", but the singular word "officer". The subsequent words "of a corporation"

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9 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ).

10 Which meant that he thereby contravened s 601FD(3). The duties under s 601FD(1) which Mr King was alleged to have failed to discharge were s 601FD(1)(a), (c), (e) and (f): see ASIC's Fifth Further Amended Statement of Claim (**AFM 47-48**) at [57].

11 Mr Anderson advanced arguments at first instance that an "officer of the responsible entity of a registered scheme" in s 601FD(1) refers only to an officer actually involved in the management of the scheme, and that paragraph (b)(ii) of the definition of "officer" did not apply at all in respect of a corporation that was a responsible entity of a registered scheme. Mr King disavowed reliance on those arguments before the QCA: **CAB 548-549** at [236]-[237].

both determine the circumstances in which "officer" is to be understood in the defined sense when it is found in the substantive parts of the CA and, as discussed further below, operate to qualify the defined term. *Second*, the definition is exhaustive. *Third*, the definition describes, broadly speaking, two classes of persons: (a) persons who occupy or hold a named office in or in relation to the corporation, in respect of which offices the legislation prescribes certain duties and functions; and (b) persons who variously engage in certain conduct (paragraph (b)(i)); have a certain kind of capacity (paragraph (b)(ii)); or have, or have had, a certain kind of influence on the directors of the corporation (paragraph (b)(iii)).[12] The contrast between those two classes provides a powerful textual indication that Parliament did not intend to restrict the class of persons described in paragraph (b)(ii) by reference to an implicit criterion that the person occupy or hold any particular office or position (as is expressly required by the other paragraphs).

31. ***Text of section 601FD(1):*** Nothing in the text of s 601FD(1) displays any intention to displace the definition of "officer" in s 9 (or, at least, paragraph (b) thereof). While s 601FD refers variously to "a reasonable person ... in the officer's position" (paragraphs (b) and (f)), and to an officer making improper use of their "position as an officer" (paragraph (e)), those references do not imply that the person described must act in an "office" (whether in the sense of "a recognised position with rights and duties attached to it", or otherwise).

32. The above submission is supported by this Court's reasoning in *Shafron*,[13] which suggests that the term "position" in s 601FD(1) (like the same word in s 180) is not apt to limit the scope of paragraph (b) of the definition of "officer". *Shafron* concerned s 180(1), which imposes a duty of care and diligence on a director or other officer of a corporation. The appellant submitted that that duty "was limited to performance of those responsibilities that attached to the office held or the circumstances that made him an 'officer'".[14] The plurality rejected that submission, holding that "[t]he effect of para (b) of s 180(1) is to require analysis of what a 'reasonable person' in the same position as the officer in question would do", which required reference both to the office held and to the responsibilities the person has.[15] One reason the content of s 180 could not be limited to

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12 *Shafron v ASIC* (2012) 247 CLR 465 at 478 [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (***Shafron***).

13 *Shafron* (2012) 247 CLR 465 at 476 [19] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

14 (2012) 247 CLR 465 at 473 [8] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

15 (2012) 247 CLR 465 at 476 [19] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added).

the duties of "the office held" was the "evident difficulty in defining, for the purposes of limiting the conduct considered, the content of 'the office held' where a person is an officer by virtue of para (b)(i), (ii) or (iii) of the definition of 'officer' in s 9".[16]

33. It is implicit in the reasoning in *Shafron* that, contrary to the approach of the QCA at [247] (**CAB 552**) and to that of the Full Court in *Grimaldi*,[17] the use of the term "office held by" in s 180(1)(b) ought not to be relied on to confine the definition of "officer". By parity of reasoning, nor should reliance be placed on the much broader term "position" (whether in s 601FD(1) or elsewhere[18]) to confine that definition.

34. ***Broad statutory context:*** The statutory context of the definition of "officer" supports ASIC's proposed construction of that definition. Three points are of particular note.

35. *First,* the word officer is defined twice in s 9. It bears one defined meaning in relation to an "officer" of a corporation, and a second defined meaning in relation to an "officer" of an entity that is neither an individual nor a corporation. Under paragraph (b) of the latter definition, "officer" means "an office holder of the unincorporated association" if the entity is an unincorporated association. The reference in that paragraph to an "office holder" can be contrasted with paragraph (c) of the same definition, which is drafted in equivalent terms to paragraphs (b)(i) and (ii) of the definition of "officer" of a corporation. The contrast provides a strong textual indication that, where Parliament intended to invoke the general concept of "holding" or "occupying" an actual office when defining an "officer", it did so explicitly.[19]

36. *Second,* paragraph (a) of the definition of "officer" in s 9 provides that a "director or secretary of the corporation" is an "officer" of the corporation. This directs attention to the definition of "director", which is also in s 9. Paragraph (b)(ii) of that definition captures persons who are sometimes called "shadow directors". The text of that paragraph is analogous to paragraph (b)(iii) of the definition of "officer". Yet nothing in the text of paragraph (b)(ii) of the definition of "director", or in the leading authorities

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16 (2012) 247 CLR 465 at 476 [19].
17 (2012) 200 FCR 296 at 324 [72] (Finn, Stone and Perram JJ).
18 See *Corporations Act 2001* (Cth), ss 180(2), 182 and 184(2).
19 See also *Corporations Act 2001* (Cth), s 57A(1), which defines the term "corporation". Under s 57A(1)(c), "corporation" includes an unincorporated body that, under the law of its place of origin, may sue or be sued, or may hold property "in the name of its secretary or of an office holder of the body duly appointed for that purpose" (emphasis added).

that have considered it,[20] suggest that a person must act in an "office" before he or she can be a shadow director of the relevant company or body. Given the similarity in language and purpose, the two provisions should be given a consistent construction. That points against the implication of any such restrictive criterion in the other functional definitions of "officer" in paragraph (b) of the definition.

37. *Third*, s 206A(1) identifies conduct that is proscribed for persons who are disqualified from managing corporations. It provides that a person who is disqualified from managing corporations under Part 2D.6 commits an offence if, amongst other things, "they exercise the capacity to affect significantly the corporation's financial standing". Section 206A(1) does not, in terms, provide that each of the specific acts mentioned in that section amounts to "managing corporations". Nevertheless, it is clear that that provision is directed at deterring persons who are disqualified from managing corporations, from managing corporations. Indeed, the heading to that section is "Disqualified person not to manage corporations". Accordingly, s 206A(1) indicates that Parliament considered the conduct proscribed by that provision to constitute, or at least to be included within the concept of, a person's management of a corporation.[21] The close symmetry between the definition of "officer" of a corporation and the terms of s 206A(1) suggests that, in framing the classes of persons identified in paragraph (b) of the definition of "officer", Parliament intended to identify persons whose actions, capacity or influence (as relevant) are related to their management of a corporation. Further, it could not sensibly be suggested that the prohibition in s 206A applies only to a person who holds an identifiable office within a corporation, for that would allow ready circumvention of the provision. But if a person can contravene s 206A without holding such an identifiable office, that points against implying such a requirement into the same words when they are used in the definition of "officer" in s 9.

B. Need for constraint on literal interpretation

38. The QCA's conclusion appears to have been influenced by a concern that paragraph (b) of the definition of "officer" could not be applied literally, for otherwise a person who is, on any realistic view, unrelated to the management of a corporation, could be subjected to

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20 See *Ho v Akai Pty Ltd (in liq)* (2006) 247 FCR 205 at 210-211 [21]-[22] (Finn, Weinberg and Rares JJ); *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47 at 51 [8]-[10] (Hodgson JA), 69-78 [180]-[243] (Young JA, Whealy JA agreeing). In *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1 at 52, Finn J observed, with reference to s 60 of the *Corporations Law*, that the idea of the definition "is that the third party calls the tune and the directors dance in their capacity as directors."

21 See *ASIC v Reid* [2005] FCA 1275; 55 ACSR 152 at [140]-[142] (Lander J).

the burdens of the provisions of the CA with respect to officers (**CAB 552** at [247]). The concern was that the literal meaning of the words used would catch persons entirely external to a corporation and who have no role in its management, but who might nevertheless be said to have a capacity to affect significantly its financial standing.

39. That concern was misplaced, for the limitation that avoids absurdity is found elsewhere. Properly construed, s 9 defines the singular word "officer", and not the composite expression "officer of a corporation". Furthermore, where the word "officer" appears in the definition, and as it is used in the chapeau to s 601FD(1), it is immediately followed by, respectively, the words "of a corporation" and "of the responsible entity of a registered scheme". Those words mean that, even when paragraph (b) of the definition is satisfied, it remains necessary to ask whether the relevant "officer" is an officer "of" the corporation or responsible entity. That question must be asked in order to give meaning to the preposition "of", for clearly a court construing a statutory provision must strive to give meaning to every word of a provision.[22]

40. In context, the word "of" should be construed, in accordance with its ordinary meaning, as indicating a relationship of belonging or affiliation between the person falling within the definition of the term "officer", and the relevant corporation. That relationship will exist as a matter of course in respect of persons falling within any of the classes described in the definition other than paragraph (b). The position is more complex for a person who falls only within paragraph (b), because whether that person also answers the description of being "of" the relevant corporation presents a question of fact and degree. In determining that question, and for reasons that are elaborated further below, it will often be of central importance whether the person is involved in the management of that corporation (as opposed, for example, to an external adviser or banker). That analysis is consistent with the approach that has been taken in previous cases that have considered the issue of whether a particular person is an officer of a corporation.[23]

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22 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

23 For example, in *Re HIH Insurance (In Prov Liq) and HIC Casualty and General Insurance (In Prov Liq); Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at 279-280 [73]-[75] (Santow J), Mr Adler was found to be an "officer" of HIHC in circumstances where HIHC was the wholly-owned subsidiary of HIH, Mr Adler was a director of HIH, and he participated in board decisions of HIH affecting the affairs of HIHC. See also *In the matter of New Bounty Pty Ltd; Winpar Holdings Ltd v Baron Corporation Pty Ltd* [2015] 107 ACSR 504 (Sackville AJA); *In re Gay* (2014) 26 Tas R 1 (Pearce J); and *Equity 8 Pty Ltd v Shaw Stockbroking Ltd* [2007] NSWSC 413 at [49] (Barrett J). As to the significance of a person's involvement in the management of a corporation, see *Buzzle Operations Pty Ltd (In Liquidation) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384 at 412 [126] (White J) (***Buzzle***).

41. For the above reason, it is unlikely that a person who falls only within one of the classes of persons described in paragraph (b) of the definition of "officer", but who is wholly external to and not involved in the management of that corporation, would nevertheless be subject to the duties imposed under s 601FD(1).

C. The legislative history of the definition of "officer" of a corporation in section 9

42. The present definition of "officer" of a corporation originates in the definition of that term in the *Corporations Law*,[24] as amended in 2000 by the *Corporate Law Economic Reform Program Act 1999* (Cth) (the **CLERP Act**). Prior to that amendment, the statutory duties imposed by s 601FD(1) of the *Corporations Law* on officers of the responsible entity of a registered scheme (and those imposed by s 232 on officers of a corporation) extended to, among others, persons who were concerned or took part in the management of the relevant corporation: "executive officers". Parliament appears to have intended paragraph (b) of the new definition of "officer" of a corporation, as introduced by the CLERP Act, to extend to the class of persons described by the definition of "executive officer". Later amendments to the legislative scheme tend to confirm that Parliament considered paragraph (b) of the definition to encapsulate sufficiently the category of persons described by the definition of "executive officer", such that the latter term was unnecessary and could be repealed. That is significant, because the text of the definition of "executive officer" was inconsistent with the implication in that definition of any restrictive criterion of occupying or holding an office in the relevant corporation. For those reasons, the legislative history and associated extrinsic materials are contrary to the QCA's construction of the definition of "officer" of a corporation.

43. In developing the submission summarised above, it is helpful to approach the legislative history chronologically.

44. ***Companies Act 1958 (Vic):*** Before the enactment of the *Companies Act 1958* (Vic) (the **1958 Act**), Australian legislatures commonly used the undefined term "officer" in substantive provisions of companies legislation, including provisions under which an "officer" might become subject to personal liability for a breach by the company of its

[24] Contained in s 82 of the *Corporations Act 1989* (Cth). The *Corporations Law* operated from 18 December 1990 of its own force in the Australian Capital Territory and, from 1 January 1991, in the States and the Northern Territory, by application.

statutory obligations.[25] As to the duties of a company's officers, the 1958 Act appears to have broken new ground in Australia, by imposing such statutory duties on officers other than a company's directors.[26] Section 3(1) defined "officer" as including a director and any officer whatsoever of a company, and s 107 relevantly provided:

> (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> (2) Any officer of a company shall not make use of any information acquired by virtue of his position as an officer to gain an improper advantage for himself or to cause detriment to the company.
>
> (3) Any officer who commits a breach of the foregoing provisions of this section shall be guilty of an offence against this Act and shall be liable to a penalty of not more than Five hundred pounds and shall in addition be liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach of any of such provisions.

45. ***Uniform Companies Acts:*** Section 107 of the 1958 Act was the model for the directors' duties provisions in the uniform companies legislation enacted in the early 1960s;[27] namely, s 124 of each of the Uniform Companies Acts. Moreover, the term "officer" was given an extended definition. For example, s 5(1) of the *Companies Act 1961* (NSW)[28] defined the term to include "any director, secretary or employee of the corporation". That provision also defined "director" as including "any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act".[29] This Court considered that definition in *Drysdale*. The QCA's reliance (**CAB 549** at [239]-[240]) on Mason J's judgment in *Drysdale* necessitates brief consideration of that case.

46. The issue in *Drysdale* was whether a person who had not been re-elected as a director,

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25 Section 44(1) of the *Companies Act 1896* (Vic) is an early example of a prohibition on the provision of financial assistance by a company for the purchase of its own shares, and s 44(2) provided that "[a]ll directors managers and officers who consent to any act in contravention" of s 44(1) were liable to the company to repay any money expended, lent or advanced in contravention thereof.

26 The first statutory duty of care in Australian law appears to have been introduced by the *Companies Act 1896* (Vic), s 116(2): R T Langford, I Ramsay and M Welsh, "The Origins of Company Directors' Statutory Duty of Care" (2015) 37 *Sydney Law Review* 489 at 490. However, that duty was imposed only on directors. As to the 1958 Act, in the second reading speech introducing the Bill for that Act, it was noted that s 107 was the first statutory provision of its kind in either Australia or the United Kingdom: see *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507 at 528 [57] (Gummow and Hayne JJ).

27 *Companies Act 1961* (NSW); *Companies Act 1961* (Vic); *Companies Act 1961* (Qld); *Companies Act 1961* (WA); *Companies Act 1962* (Tas); *Companies Act 1962* (SA); *Companies Ordinance 1962* (ACT); *Companies Ordinance 1963* (NT) (**Uniform Companies Acts**).

28 Each of the other Uniform Companies Acts contained a virtually identical definition.

29 That definition was qualified in s 5(2), which provided that "a person shall not be regarded as a person in accordance with whose directions or instructions the directors of a company are accustomed to act by reason only that the directors act on advice given by him in a professional capacity".

but who continued to act as such, could be liable for failing to act honestly and to use reasonable diligence in the discharge of the duties of his office contrary to s 124(1) of the *Companies Act*. The Court held that a de facto director was a "director" within the meaning of s 124(1). Justice Mason considered (at 242) that the term "director" in s 124(1) encompassed a de facto director, because the words of that sub-section, read with the first part of the definition of "director", assumed that a director was someone who occupied an office to which duties attached and, further, a person could "occupy" an office by acting in it, with or without lawful authority. Justice Mason's analysis, in relation to the quite different issue that arose in that case, cannot simply be transposed in construing the provisions of the CA that are relevant in this case, not least because the definition of "director" in s 5(1) of the *Companies Act* was inclusive.

47. As already noted, "officer" of a corporation is defined exhaustively in s 9 and, at least in the case of the provisions in Part 2D.1, s 179 makes explicit Parliament's intention that that definition is to apply in respect of the provisions of that Part concerning the duties of officers of corporations. For the reasons discussed above, this Court's reasoning in *Shafron* determines the correct approach to construing paragraph (b) of the definition of "officer" in s 9, read together with provisions such as ss 180(1) and 601FD(1).

48. ***Companies Act 1981 (Cth) and Uniform Codes:*** On the enactment of the *Companies Act 1981* (Cth) (the **1981 Act**), and as part of the national co-operative scheme for the regulation of companies,[30] the definition of "officer" was altered to refer, inclusively, to "a director, secretary, executive officer or employee of the corporation". The new term "executive officer", in relation to a corporation, was defined in s 5(1) to mean:

> any person, by whatever name called and whether or not he is a director of the corporation, who is concerned, or takes part, in the management of the corporation;

49. Further, the duties imposed by s 229(1) and (2) on "an officer" (which are broadly analogous to the duties for which ss 180 and 181 CA make provision), or by s 229(3) and (4) on an "officer or employee" (which are analogous to the duties for which ss 182 and 183 CA make provision), operated by reference to a specific, exhaustive definition of "officer" in s 229(5), which included "executive officers" as well as various external administrators, but which did not include employees of a corporation. In that way, the companies legislation — for the purpose of imposing statutory duties of the kind for

[30] The 1981 Act applied in the Australian Capital Territory of its own force, and in the States and the Northern Territory by application.

which ss 180-183 CA now provide — sought to identify persons by reference to the nature of their involvement in the management of a corporation, and not simply by reference to their occupation, or to the title of their office.

50. In *Commissioner for Corporate Affairs (Vic) v Bracht*,[31] Ormiston J considered the circumstances in which a person might be found to be concerned or take part in the management of a corporation. That case involved an information laid against Mr Bracht, a bankrupt, which alleged that, in breach of s 227(1) of the *Companies (Victoria) Code*, he was concerned in or took part in the management of a corporation without the leave of the Court. The terms of s 227(1) were, relevantly, substantially the same as the terms of the definition of "executive officer" in the 1981 Act. After considering relevant authorities and the statutory purpose of the provision (at 827-830), his Honour expressed the view (at 830) that the concept of "management":[32]

> comprehends activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs.

51. ***Corporations Law:*** Section 9 of the *Corporations Law* contained definitions of "executive officer" and "officer" that were, so far as is relevant, substantially the same as those in s 5(1) of the 1981 Act. Similarly, s 232 of the *Corporations Law* replicated the duties imposed by s 229 of the 1981 Act on "officers" and "employees", as well as the definition of "officer" that was specific to that provision.[33] Later, a definition of "officer" was introduced in s 82A by the *Corporations Legislation Amendment Act 1991* (Cth), which effectively replicated the previous definition of that term in s 9, and the latter section was amended to provide that "officer" had the meaning given by s 82A.

52. ***Managed Investments Act 1998 (Cth):*** The *Managed Investments Act 1998* (Cth) effected a range of substantial amendments to the *Corporations Law* to provide for a new

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31 [1989] VR 821 (***Bracht***).

32 *Bracht* was followed, in relation to the application of provisions analogous to s 227(1) of the *Companies (Victoria) Code*, in *Griggs v Australian Securities Commission* (1999) 75 SASR 307 at 317-320 [38]-[49] (Bleby J) and *Nilant v Sherton* [2001] WASCA 421 at [17]-[18] (Parker J, Steytler and Miller JJ agreeing). See also *Cullen v Corporate Affairs Commission (NSW)* (1988) 14 ACLR 789 at 793-794 (Young J). Compare *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474 (Burchett J).

33 In *ASIC v Vines* (2005) 55 ACSR 617, Austin J considered whether *Bracht* should be followed in construing the definition of "executive officer" in the *Corporations Law* with respect to officers' statutory duties in s 232 of the *Corporations Law*. His Honour concluded (at 854 [1049]) that *Bracht* should be followed, and held that, in the statutory context of s 232, the purpose of the definition of "executive officer" was to identify "amongst those who work for a corporation, that group whose responsibilities are significant enough to justify the imposition of special statutory duties". That aspect of his Honour's reasons was not questioned on appeal: *Vines v ASIC* (2007) 73 NSWLR 451.

regime, set out in Part 5C, for the regulation of managed investment schemes. That regime replaced provisions dealing with the regulation of prescribed interests.[34] Among other things, that Act made provision for regulated schemes to have a single scheme operator, a "responsible entity", on which s 601FC imposed various statutory duties. Sections 601FD and 601FE imposed duties on, respectively, officers and employees of a responsible entity. The definition of "officer" in s 9 was amended to provide that: (a) in relation to the responsible entity of a registered scheme, the term meant a person who is a director, secretary or executive officer of the company that is the responsible entity; and (b) in any other case, the term had the meaning given by s 82A.

53. ***CLERP Act:*** In March 2000, the CLERP Act inserted a new Part 2D.1 of the *Corporations Law*, which dealt with the duties and responsibilities of officers and directors, and repealed s 232. The s 9 definition of "officer" was substituted with a new, exhaustive definition of "officer" of a corporation, which was relevantly identical to the current definition with which this appeal is concerned. That is to say, the new definition:

    (a) applied (s 179) in relation to the duties and responsibilities imposed under Part 2D.1, but did not expressly extend to "executive officers", on whom s 232 of the *Corporations Law* had previously imposed duties;

    (b) extended to the classes of persons described in paragraph (b) of the definition; and

    (c) no longer provided explicitly for a definition of "officer" in relation to the responsible entity of a registered scheme.

54. The Explanatory Memorandum to the Bill that became the CLERP Act did not address the amendment to the definition of "officer" in s 9 in detail, other than to state:[35]

> 6.21 The draft provisions rewrite the duties of officers and employees in current section 232 of the Law to make it easier for company officers to know what is expected of them.
>
> 6.22 The draft provisions define officer to include a director or secretary as well as certain other persons who may manage the company, but not employees (proposed subsection 179(2)). Where an obligation imposed by the Law applies to employees, as well as officers, the Law will state this.

Those statements are consistent with the proposition that paragraph (b)(i) and (ii) of the new definition of "officer" were intended to extend (at least) to persons who had previously fallen within the definition of "executive officer" because they were persons

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[34] See *Westfield Management Ltd v AMP Capital Property Nominees Ltd* (2012) 247 CLR 129 at 135-136 [10]-[12] (French CJ, Crennan, Kiefel and Bell JJ).

[35] Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) at [6.21]-[6.22].

concerned, or taking part, in the management of a corporation. The similarity between the text of those paragraphs of the new definition and the manner in which "executive officer" had been interpreted by the courts supports that view.[36]

55. ***Corporations Act:*** In 2001, the CA replaced the *Corporations Law* regime for the regulation of corporations. Upon enactment, it retained, in s 82A, an inclusive definition of "officer" that was equivalent to s 82A of the *Corporations Law*. That is, the definition extended to, relevantly, "a director, secretary, executive officer or employee of the body or entity". The term "executive officer" was defined in s 9 to mean "a person who is concerned in, or takes part in, the management of the body (regardless of the person's designation and whether or not the person is a director of the body)." Section 9 also contained a definition of "officer" of a corporation (which term was itself defined in s 57A to include any body corporate) that replicated the definition of the term "officer" of a corporation in s 9 of the *Corporations Law*.

56. ***CLERP 9 Act:*** The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (the **CLERP 9 Act**) made numerous amendments to the CA. The Explanatory Memorandum to the Bill for the CLERP 9 Act explained that "[t]he proposed amendments in Schedule 9 of the Bill are designed to clarify the classes of personnel who have duties and obligations under the Act."[37] Relevantly, those amendments were as follows.

57. *First*, s 82A was repealed. The Explanatory Memorandum stated (at [5.572]) that:

> There are two overlapping definitions of the term "officer" found in sections 9 and 82A of the Corporations Act respectively. Schedule 9 of the Bill will address the potentially confusing operation of these provisions by repealing the section 82A definition of "officer" ... and leaving the section 9 definition.

58. *Second*, the definition of "executive officer" in s 9 was repealed, and a new definition of "senior manager" was introduced. The Explanatory Memorandum explained that a definition of "executive officer" in relation to bodies corporate had been necessary because of the extension, by s 82A, of the definition of "officer" to employees of such

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[36] Contemporaneous commentators expressed the view that, in light of the similarity between the statutory text and the reasons of Ormiston J in *Bracht*: "[i]t is therefore clear that Parliament has endeavoured to codify in the definition of officer the principles emanating from judgments such as *Bracht* which define executive officer": H A J Ford, R P Austin and I M Ramsay, *An Introduction to the CLERP Act 1999* (Butterworths, 2000) at [2.5]. See also *ASIC v Citigroup Global Markets Australia Pty Ltd* (2007) 160 FCR 35 at 100 [488]-[490] (Jacobson J) (***Citigroup***).

[37] Explanatory Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth), [5.571].

bodies. In that context, the definition of "executive officer" was said to have "distinguished between officers who took part in management of the company and ordinary employees" (at [5.580]). Further, with the repeal of s 82A, references to "executive officer" could not simply be replaced by the term "officer" (as defined in s 9), because paragraphs (c) to (e) of that definition would "undesirably widen the scope of the provisions" which spoke to executive officers (at [5.581]-[5.582]). Accordingly, a new definition of "senior manager" was introduced, and sections that relied on the term "executive officer" were amended to use the new term "senior manager".

59. The extrinsic materials associated with the CLERP 9 Act also addressed the definition of "officer" of a corporation in s 9. The Department of Treasury's October 2003 Commentary on the Draft Bill for the CLERP 9 Act observed that:[38]

> The term ["executive officer"] has been interpreted by courts to cover a wide range of activities relating to management, where there is involvement in some kind of decision-making process. That wide approach has been narrowed in subsequent cases, but the general thrust of the court judgements was codified as part of the section 9 definition of "officer".
>
> The term "executive officer" is unnecessary as a result of the amendments proposed above. It is already sufficiently encapsulated by subsection 9(b) definition of "officer", and section 82A is to be removed so there is no need for such a distinction. Further the concept of being "concerned in management..." as described by the definition of "executive officer" is not easily definable, and subsequent reliance on judicial interpretation is unwelcome. (emphasis added)

60. The Explanatory Memorandum stated the following:[39]

> The existing section 9 definition of "officer" generally covers persons who have a degree of influence or potential influence over the general conduct of the entity, through the office they hold or otherwise. Although some employees fall within the section 9 definition, a large number would not. (emphasis added)

61. ***Conclusion concerning legislative history:*** The legislative history and extrinsic materials that underlie paragraph (b) of the definition of "officer" in s 9 point against the proposition that a person must hold or act in "a recognised position with rights and duties attached to it" in order to come within paragraph (b) because:

    (a) Prior to its amendment by the CLERP Act, the *Corporations Law* relevantly imposed on "executive officers" duties and responsibilities under ss 232 and 601FD. The text

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38 Commonwealth, *CLERP (Audit Reform and Corporate Disclosure) Bill – Commentary on the Draft Provisions – Corporate Law Economic Reform Program No 9* (October 2003), Chapter 9, [569]-[570] (citations omitted). See also *Buzzle* (2010) 238 FLR 384 at 412 [126] (White J).

39 Explanatory Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) at [5.578].

of the definition of "executive officer" was inconsistent with the implication in that definition of any restrictive criterion of occupying or holding an office in the relevant body corporate.

(b) The CLERP Act repealed s 232, inserted a new Part 2D.1, and substituted the definition of "officer". Had it been the intention of the legislature significantly to alter the breadth of the classes of persons the subject of duties under those provisions, there would have been some indication of that intention in the contemporaneous extrinsic materials. No such indication exists.[40] Instead, the legislative history and extrinsic materials confirm that Parliament considered the
10 definition of "officer" of a corporation, as introduced by the CLERP Act, to have rendered the term "executive officer" unnecessary, because the definition of officer already "covers persons who have a degree of influence or potential influence over the general conduct of the entity, through the office they hold or otherwise".[41]

(c) The legislative history and extrinsic materials support the proposition that there must be a relationship of belonging or affiliation between the "officer" and the relevant corporation and that, in determining whether that relationship exists, it will often be of central importance whether the person is involved in the management of that corporation.[42]

D. Promotion of protective purpose

20 62. Finally, the evident purpose of the provisions of Chapter 5C, and specifically s 601FD, is to provide protection to members of managed investment schemes, by imposing duties and responsibilities on officers of responsible entities.[43]

63. ASIC's proposed construction of the definition of "officer" in s 9 better achieves the protective purpose of those key provisions of the CA, and should be preferred to the QCA's construction. On the QCA's approach, it seems that in referring to a "recognised position with rights and duties attached to it" that is not "recognised" by the statute (**CAB**

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40 Compare *Norman v FEA Plantations Ltd* (2010) 191 FCR 39 at 47 [40] (Finkelstein J).

41 Explanatory Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth) at [5.578] (emphasis added).

42 Lower courts have relied on aspects of the legislative history to emphasise the importance, to the application of paragraph (b)(ii) of the definition, of the involvement of a person in the management of the subject corporation: see *Buzzle* (2010) 238 FLR 384 at 412 [126] (White J); *Citigroup* (2007) 160 FCR 35 at 100 [490] (Jacobson J).

43 *Trilogy Funds Management Limited v Sullivan (No 2)* (2015) 331 ALR 185 at 332 [669] (Wigney J). See also *ASIC v Lewski* (2018) 362 ALR 286 at 299 [52] (the Court).

552 at [246]), the QCA must have been referring to a position in the corporation's organisational structure, perhaps recognised contractually as between the corporation and the relevant employee, and perhaps also in the corporation's constitution. But if some such indicium is needed to be an "officer", it would be possible to avoid falling within the terms of paragraph (b) by the simple expedient of altering the corporation's organisational structure. That would promote the avoidance of primary liability of persons for contraventions of, relevantly, s 601FD, through self-serving corporate group structures, and permit their indemnification by the corporation in relation to any accessorial liability, despite the policy evinced by s 199A.

64. In the context of a corporate group, the QCA's formulation of a "recognised position with rights and duties attached to it" might also describe an officer, employee or contractor of a parent company, in relation to whom there exists a formal allocation of responsibilities in respect of the subsidiary company, for instance by way of a group delegations policy. It would be a perverse outcome if the personnel of a corporate group that has adopted transparent corporate governance practices, including the formal allocation of responsibilities of the kind described, were thereby more likely to be subject to duties of the kind imposed under s 601FD in respect of a subsidiary of that group, as compared to the personnel of a corporate group that has not adopted practices of that kind.

E. QCA orders of 18 June 2019

65. After special leave to appeal was granted on 17 May 2019 and ASIC's notice of appeal was filed on 29 May 2019, the QCA made further orders in relation to pecuniary penalty and costs.[44] Specifically, on 18 June 2019 the QCA made orders reducing Mr King's pecuniary penalty from $300,000 to $270,000; reduced his liability to pay a proportion of ASIC's trial costs from 60% to 50%; and ordered that Mr King pay 75% of ASIC's appeal costs. The foundation for all of those orders was the Court's finding in favour of Mr King on the "officer" issue. As such, the orders of 18 June 2019 are affected by the same error as the QCA's orders of 18 December 2018.

66. In those circumstances, ASIC has filed a summons[45] seeking special leave to appeal against the 18 June 2019 orders and, if special leave is granted, leave to amend the notice of appeal. That application should not have any effect on the argument of the existing appeal. However, if that appeal is allowed, logically the QCA's 18 June 2019 orders

[44] [2019] QCA 121; **Supp CAB 4**; **Supp CAB 19**.
[45] **Supp CAB 21**.

ought to be set aside (for those orders would have been included in the original application for special leave, had they been made before that application was heard and determined). In addition, Mr King should be ordered to pay ASIC's costs of his appeal to the QCA; and the orders of the trial judge concerning penalty and trial costs should be reinstated. No order should be made as to the costs of ASIC's cross-appeal in the QCA.

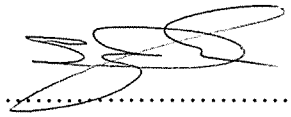
PART VII: ORDERS SOUGHT

67. The orders sought are set out in the proposed amended notice of appeal.[46]

PART VIII: ESTIMATE OF TIME FOR ORAL ARGUMENT

68. Up to 2 hours may be required to present ASIC's argument.

10 Dated: 5 July 2019



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[46] **Supp CAB 50.**