ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S173 of 2011

BETWEEN

PETER JAMES SHAFRON
Appellant

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Part I: Certification

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

Part II: Submissions in Reply

The "Officer" Issues

Participates in making decisions

2. ASIC's submissions (**RS**) on this topic are notable for their reluctance to address the words of the statute.

3. In its treatment of the legislative history of the definition of "officer", ASIC asserts that the absence from the extrinsic materials of any discussion of the *"significance or otherwise"* of the change from the definition based on the reasoning in *Commissioner for Corporate Affairs v. Bracht* [1989] VR 821 to the definition incorporating the words *"participates in making"* suggests that *"the new definition was not intended to effect any significant departure from, much less any narrowing of, the previous definition"* (RS [15]). Two points should be made in this regard:

   a. *First*, the effect of this submission is to seek to have the current definition of "officer" construed, not by reference to the statutory text, but by reference to the different statutory text contained in earlier legislation. The Court of Appeal correctly observed that the two statutory definitions are *"quite different"* (ABWhi/173.15; CA [886]).

   b. *Secondly,* the absence of discussion in extrinsic material provides no basis at all upon which to draw any inferences as to the intention of Parliament. Indeed, the *absence* of discussion in extrinsic material is arguably not caught by s. 15AB of the *Acts Interpretation Act* 1901 (Cth). In any event, in Mr Shafron's submission,

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ASIC has not shown the definition to be ambiguous or obscure, or suggested any other basis upon which recourse to extrinsic material would be appropriate.

4. ASIC then makes four specific submissions in support of its contention that a person in Mr Shafron's submission can be said to *"participate in making decisions"*.

5. ASIC's first submission does not seek to explain what the word *"participates"* in the statutory definition means, but simply repeats the Court of Appeal's observation that whether there is *"participation"* is a *"question of fact"*, or a question of *"fact and degree"* (RS [18]). This begs the question of the meaning of the expression *"participate in making decisions"*. For the reasons given in Mr Shafron's Appellant's Submissions in this Court (**Mr Shafron's Appellant's Submissions**), the natural meaning of the expression involves taking part in making decisions. It must involve some decision-making role. ASIC's submissions make no attempt to identify the nature and quality of the activities that it says qualify as *"participating in making decisions"*.

6. ASIC's second submission disputes Mr Shafron's characterisation of his role as confined to providing advice to the board (RS [19]). ASIC submits that Mr Shafron's role was *"proactive"*, and the board merely *"reactive"*. That is because, ASIC says, along with other JHIL executives, Mr Shafron was involved in formulating proposals for the consideration of the board. In relation to that submission, the following points should be noted:

   a. *First*, the totality of the findings of the trial judge and the Court of Appeal make clear that the proper characterisation of Mr Shafron's role is one of the provision of advice and assistance to the board (see ABRed2/511W-513O; LJ [379]-[385], ABWhi/173.46, ABWhi/174.38, ABWhi/175.17; CA [889], [891], [894]).

   b. *Secondly*, the submission does not shed any light on the construction of the definition for which ASIC contends, except inferentially to concede that the mere provision of advice to those who make decisions would not be sufficient to bring a person within the definition.

   c. *Thirdly*, care must be taken in the use of summary terms such as *"formulating"* or *"promoting"* (or *"advising"*, for that matter), to ensure that conclusions as to a person's *"participation in the making of decisions"* are based on concrete facts, rather than mere labels. It may be accepted that Mr Shafron was one of the executives involved in the *"formulation"* of proposals to be put to the board. The fact that such proposals were developed by company executives for the consideration of the board is hardly surprising. Detailed consideration of the way in which separation of asbestos liabilities could be achieved, and the consequences of those different options, is not something that could easily be done at a board meeting, or by individual directors. It was a natural task to be assigned to management for work between meetings. The formulation of proposals thus arose from directions given by the CEO or the board. For

example, when the board rejected the net assets model at the January 2001 meeting, *"management was sent away to do more work on the Separation Proposal"* (ABRed2/423I; LJ[89], ABWhi/23.46; CA[91]).[1] Accordingly, management was not proactive, but rather responsive to the board's instructions. In this manner, the company's management was directed by the board to develop different, or varied, proposals, and to bring them back to the board for consideration (see, e.g., ABWhi/18.31, ABWhi/19.1, ABWhi/25.23; CA [67], [70], [98]). Proposals could be accepted, rejected or varied by the board, as evidenced by the outcomes and directions of the board at JHIL board meetings.[2] To the extent, therefore, that the development of proposals at the direction of the board or the CEO, in order to permit the board to consider whether a high-level strategic objective (namely, the separation of asbestos liabilities) could and/or should be achieved, may be described as the *"formulation"* or *"promotion"* of such proposals, it is apparent that, in substance, that work is also properly characterised as the provision of advice and assistance to the board. No part of Mr Shafron's activities, even as described by ASIC, can be regarded as the "*participation in the making of decisions*". This is reinforced by the evidence of the directors.[3]

7. ASIC's third submission is that the construction for which Mr Shafron contends would *"unduly limit the definition of the term officer"* (RS [20]). Again, that submission begs the question. The limits of the statutory concept of "officer" are set by the words of the statute, not some *a priori* notion of its proper breadth. Furthermore, with respect, ASIC's submission as to the limited work done by the words *"participates in making decisions"* on Mr Shafron's construction (and thus the asserted *"unlikelihood"* of that construction) should not be accepted:

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[1] Mr Brown expected management to come back to the board with a revised proposal at the February 2001 board meeting (ABWhi/24.2 and ABWhi/25.43; CA[92] and [100]).

[2] During the JHIL board meetings (April, August and November 2000), management made recommendations to the board which the directors ultimately decided not to follow, and management was asked to continue developing the concepts for further discussion (ABWhi/17.21 and ABWhi/18.31; CA[62]-[63] and [67]-[70]).

[3] The directors' evidence was explicit in their recognition that they, not lawyers and not 'management', made the decisions (ABBla3/1303M-O; T2021.24-28 (Brown XX); ABBla4/1484E-N; T2206.08-26 (Brown XX); ABBla5/2265U-W; T3037.42-44 (Hellicar XX). Particularly, Ms Hellicar stated that she did not always agree with management and did not feel obliged to agree (ABBla5/2265S; T3037.37) and Mr Willcox stated that he did not always agree with the advice provided by Allens (ABBla6/2917L; T3737.17). He also acknowledged that ultimately the directors were responsible for deciding whether, on the basis of the assumptions, it was appropriate to approve the Foundation (ABBla6/2975N; T3795.27). Indeed, Mr Brown stated that it would be *"very unusual"* for a person in Mr Shafron's position to question the directors as to their understanding of the material presented to them prior to making a decision in favour of the Foundation and the top-up (ABBla4/1536T-1537H; T2258.39-T2259.12). Mr Gillfillan admitted that it would have been *"socially inappropriate"* for Mr Shafron to have questioned whether he had read all the appropriate paperwork (ABBla4/1966O-Q; T2725.28-33) or inquire at the meeting whether he had formed an opinion as to the adequacy of the funding of the Foundation (ABBla4/1974T-V; T2733.38-42). Mr Brown also stated that certain advantages raised by management outweighed the issues highlighted by external lawyers and that whilst he always paid attention to legal advice, there would be times when it would not have necessarily been appropriate to follow it.(ABBla3/1303G-O; T2021.10-28)

a. For one thing, capturing persons who are members of committees that make decisions is no insignificant thing. Many decisions are made by committee, and it would be a gaping lacunae in the legislative scheme if the making of a decision at committee level took individual members outside of the statutory definition. On this basis alone, the words *"participate in making decisions"* do real, extensive, and important work.

b. For another, it should not be accepted that persons who make decisions jointly with others, or persons who make decisions subject to ratification by others, would inevitably be held to *"make"* a relevant decision. The former category raises considerations similar to the "committee" example – an individual can legitimately deny *"making"* a joint decision, but hardly deny *"participating"* in making the decision. Persons in the latter category make a decision, no doubt, but may argue that the "*real*" decision is the decision to ratify. The particular facts of individual cases may well disclose that the first person's role was as a *"participant"* in the making of the relevant decision.

8. It is thus submitted that Mr Shafron's proposed construction precisely avoids any technical *"point in time"* issues in determining those who have participated in making decisions (c.f., RS [21]). Rather, it looks to the substance of an individual's involvement in making the decision in question. Equally, however, Mr Shafron's construction gives effect to the statutory language which requires participation, not in the formulation of a proposal, or the development of ideas, or the provision of advice and assistance to a decision maker, but in the making of a decision itself.

9. ASIC's fourth submission seeks to minimize the significance of the additional matters relied upon by the Court of Appeal in finding that Mr Shafron participated in decisions of the relevant character (RS [22]). Whether or not those matters were properly particularised by ASIC,[4] they were not made the subject of any specific submission,[5] and it appears ASIC has implicitly conceded that they do not add anything to the primary basis upon which the Court of Appeal decided the question (i.e., Mr Shafron's involvement in the preparation of proposals for consideration by the board).

10. Overall, therefore, it is apparent that ASIC's submissions on this topic do not engage directly with the words of the statute. In Mr Shafron's submission, it is necessary to give full effect to the ordinary and natural meaning of the words *"participate in making a decision"*, and that can only be done by recognising that a role in making a decision is what is required. On no view of the facts, did Mr Shafron have any relevant decision-making role in this case.

[4] Mr Shafron submits that the over-broad particulars provided should not be held sufficient to have put him on notice of the particular use sought to be made of these particular examples.

[5] The vague reference in ASIC's trial submissions (referred to by ASIC at the conclusion of footnote 23 to RS [23]) was not sufficient to raise for consideration the matters upon which the Court of Appeal relied.

Responsibilities within the corporation

11. ASIC's submissions on this topic rely heavily on the various extrinsic materials to the CLERP Act, and the decision of Austin J in *ASIC v. Rich* (2003) 44 ACSR 341. In relation to those matters:

    a. ASIC does not identify the ambiguity or obscurity in the language of s. 180(1), or any other basis upon which it would be appropriate to have regard to extrinsic material under s. 15AB of the *Acts Interpretation Act* 1901 (Cth). In any event, the references to *"duties"* and *"responsibilities"* in the material to which ASIC refers (see RS [14]-[15]) are naturally read as referring to the duties and responsibilities of the officer's office, and not to whatever other duties and responsibilities *outside* that office the officer may have.

    b. The decision in *Rich* provides no better support for ASIC's construction (c.f. RS [24]-[25]). Austin J held that the *"responsibilities"* to which s. 180(1) refers are those in fact forming part of the office held. His Honour said nothing to suggest that the *"responsibilities"* included responsibilities *outside* of that office. The critical passage in his Honour's judgment is in the following terms (at [49]):

    > *"The director's responsibilities would include arrangements flowing from the experience and skills that the director brought to his or her office, and also any arrangements within the board or between the director and executive management affecting the work that the director would be expected to carry out."*

    That reasoning makes clear that it is necessary to look at the particular circumstances of every case to determine the responsibilities of a particular officer's office. It is, in other words, necessary to look past the formal delegation of tasks to the actual responsibilities of an office (see also at [50]). Austin J thus held that it was part of Mr Greaves' role as a director to chair the board and the finance and audit committees. His Honour did not find that responsibilities of Mr Greaves outside of his role as director were subject to s. 180(1).

12. ASIC's submissions on the statutory language should also be rejected (RS [27]). ASIC draws a false dichotomy when it says that the words *"and had the same responsibilities within the corporation as the director or officer"* are *"clearly directed to the responsibilities of the individual in question not simply the office they occupy"* (RS [27]). The words are directed to the responsibilities of the *individual office* occupied by the officer.

13. It is submitted that, as Austin J's discussion in *Rich* makes clear, the purpose of the words upon which ASIC relies was to ensure that the actual responsibilities of the particular office were subject to the statutory standard of care (and not merely those responsibilities formally delegated as being responsibilities of the office in question). As his Honour said (at [50]):

"[Responsibilities] is a wider concept, referring to the acquisition of responsibilities not only through specific delegation but also through the way in which work is distributed within the corporation in fact, and the expectations placed by those arrangements on the shoulders of the individual director."

14. His Honour was not there suggesting that responsibilities other than responsibilities of the office were to be subject to s. 180(1).

15. There is a curious conclusion to ASIC's submissions on this topic. ASIC submits that responsibilities that are *"completely unrelated"* to the office in question will (or may) not be subject to s. 180(1) (RS [28]). With respect, it is difficult to see why that should be so if ASIC's construction is otherwise accepted. It must follow that if ASIC's preferred construction is correct, then all responsibilities of an officer within a corporation, no matter how far removed from the responsibilities of the office in question, will be caught. The fact that ASIC promotes this unprincipled exception suggests a recognition of the difficulties inherent in, and the unreasonable consequences of, its proposed construction.

Company Secretary

16. ASIC appears to submit that the role of a company secretary will always extend to the provision of advice to the board, and to *"taking steps to ensure compliance by the company with its various regulatory and legal requirements"* (RS [30]). The *Corporations Act* only gives minimum content to the role of company secretary. As ASIC points out, if nothing else, s. 188(1) makes a company secretary liable for certain failings of the company. Section 188(1) (and the other provisions to which ASIC refers) do not, however, support the extensive, generalised, duty postulated by ASIC. The specific obligations imposed upon secretaries by the *Corporations Act* (either directly, or indirectly, by making them liable for failures of the company) are all properly characterised as ministerial or administrative functions. It is impossible to extrapolate from those functions some general duty to advise the board about the company's regulatory or legal obligations. Indeed, it is not even possible to infer any general obligation to offer substantive advice in relation to the content of notices etc. that the company is obliged to file.

17. ASIC also relies on other generalised statements that have been made about the nature and role of company secretaries (RS [31]). Such statements fail to have any regard to how functions within JHIL were divided between the company secretary and general counsel. To the extent that ASIC seeks to support those submissions by reference to evidence as to the role of a company secretary in *"regular business"* (see footnote 28 to RS [31]), that material was not tendered below, and may not be considered by this Court on appeal.[6]

[6] *Eastman v. R* (2000) 203 CLR 1; *Mickelberg v. R* (1989) 167 CLR 259.

18. ASIC's reliance (at [31]) on authority that a company secretary is the *"natural mouthpiece"* to speak on behalf of the company ignores the factual circumstances of the present case, as JHIL's disclosure policy makes it clear that a company secretary's authority to disclose information publicly is limited to such actions "*on behalf of the Board*"[7], that is, in a ministerial capacity.

19. Ultimately, however, as ASIC recognises, and the Court of Appeal held, the role of company secretary in a particular company is a question of fact: see ABWhi/176/5; CA [899] and the cases there cited. For the reasons given in Mr Shafron's Appellant's Submissions, the most powerful evidence of the actual role and responsibilities of the office of company secretary in JHIL is provided by the extent to which the responsibilities of Mr Shafron and Mr Cameron (JHIL's other company secretary) were common.

20. ASIC's submission that this comparison is uninstructive, due to the fact that Mr Shafron had *"legal qualifications and experience"*, misses the point (RS [33]). Mr Shafron also held the additional, and separate, position of *"general counsel"*. The additional responsibilities possessed by Mr Shafron by reason of his legal qualifications and experience are naturally to be assigned to, and considered as the discharge of, that position.

21. The suggestion by ASIC that Mr Cameron may in fact have had the same responsibilities as Mr Shafron, but merely lacked the opportunity to perform them because he did not attend board meetings, should be rejected (RS [33]-[34]). That suggestion has never previously been made, and no evidence to that effect was led from Mr Cameron. There is simply no basis in the evidence from which such a conclusion may be drawn.

22. Ultimately, it is Mr Shafron's submission that the role of company secretary in JHIL was an administrative role. It was the position of general counsel that carried with it an obligation to provide legal and other advice to the company.

The DOCI Contravention

23. ASIC's submissions in relation to the DOCI contravention fall into three broad categories:

    a. *First,* ASIC contends that Mr Shafron's arguments involve challenges to factual findings outside the scope of his notice of appeal (RS [43], [44], [46]).

    b. *Secondly,* ASIC submits that a reasonable person would not have regarded Allens as implicitly advising him that disclosure was not required (or would not have relied on that implicit advice) for various reasons, including that no specific request was made to Allens for such advice, and that Allens did not request, and

[7] [ABBlu1/109]; ALNS.015.003.0070 at 0075

was not provided with, information relevant to the impact of the information upon the market price for JHIL's shares (RS [36], [45], [47]).

c. *Thirdly*, ASIC submits that, even if Allens could reasonably have been expected to advise on disclosure of the DOCI Information, Mr Shafron was under an independent obligation to raise the issue himself (RS [41], [43], [47]).

24. In relation to the first of those arguments, Ground 5 of Mr Shafron's notice of appeal alleges that the Court of Appeal erred in finding that he contravened s. 180(1) by failing to take one or more of the three steps pleaded by ASIC *"given that [Allens] had been retained by JHIL in relation to Project Green, including advising on JHIL's obligation to disclose the DOCI Information"*. It is submitted that that ground of appeal is sufficient to encompass the challenge to the Court of Appeal's factual findings in relation to the nature of the requests for advice made to Allens, and the scope of Allens' retainer, set out in Mr Shafron's Appellant's Submissions.

25. In relation to the second argument:

a. In Mr Shafron's submission, whether a reasonable person would have considered that Allens would have spoken up if it regarded continuous disclosure as necessary, does not depend on whether a specific request for advice on that topic was made. It is not in dispute that Mr Shafron specifically requested advice from Allens in relation to disclosure of some kind in relation to the DOCI. For the reasons given in Mr Shafron's Appellant's Submissions, even if those specific requests are held not to concern ASX continuous disclosure, they were more than adequate to raise the question of disclosure generally. The question is not, therefore, whether Mr Shafron specifically requested advice concerning continuous disclosure. It is whether, in all the circumstances (including Allens' detailed involvement in the project generally[8], Allens' drafting of the DOCI,[9] the specific requests that were made to Allens regarding disclosure, Allens' presence at board meetings, including *"notably the meeting at which the DOCI was agreed,*[10] Allens' involvement in *"settling the draft ASX announcement"*,[11] and all the other matters set out in Mr Shafron's Appellant's Submissions), a reasonable person would have understood the issue to be one upon which Allens would be expected to speak.

b. The fact that Mr Shafron once specifically sought advice from Allens in relation to continuous disclosure obligations (ABWhi/199.35; CA [1026]) is not at all inconsistent with the existence of a general retainer on the part of Allens to advise

[8] The Court of Appeal recognised that *"Allens advised extensively in relation to Project Green"* (ABWhi/198.47; CA[1022]) and were *"deeply engaged in advising and otherwise acting for JHIL"* in relation to Project Green (ABWhi/45.5; CA[200])

[9] The Court of Appeal recognised that Allens' involvement extended to drafting *"all relevant documents"*, including the DOCI (ABWhi/200.17; CA[1030]). See also [ABBlu4/1845]; PWC.016.005.0209 attaching draft of the DOCI: [ABBlu4/1847]; PWC.016.005.0211

[10] ABWhi/200.18; CA[1030]

[11] ABWhi/200.19; CA[1030]

in relation to that topic, let alone suggestive of an invariable practice that such advice would only be provided pursuant to a specific request. That single example provides particularly slender support for the inference drawn by the Court of Appeal (and supported by ASIC) for at least the following reasons:

i. The advice given by Allens, when the matter was specifically raised, was that no disclosure was required. The fact that Allens remained silent up until the *"no disclosure"* advice was provided is thus entirely consistent with an expectation that Allens would speak up if it considered disclosure to be *necessary*, and not otherwise.

ii. The matter was specifically raised with Allens following a question concerning continuous disclosure from a director at a board meeting. In other words, there was a specific call for the advice. It is unsurprising, in those circumstances, that the matter was specifically raised with Allens.

c. The suggestion that Allens could not be expected to advise in relation to continuous disclosure because it had not been provided with information pertaining to the likely impact on the market price for JHIL shares should be rejected. There can be no serious suggestion that Allens was not in a position to understand the commercial imperatives, objectives and consequences of the transaction. Senior lawyers from Allens had been involved throughout the entire history of the separation proposals, including attendance at board meetings. At the very least, Allens was plainly sufficiently well-informed to provide advice as to the necessity to consider the question.

26. In relation to the third argument:

a. It does not follow from the Court of Appeal's finding that Mr Shafron was, at least on one occasion (i.e., 16 October 2000), no *"mere conduit"* for the advice of external lawyers (ABWhi/200.31; CA [1032]) that he was in every instance obliged to provide independent advice to the company to complement external advice. That is to say, the fact that, on one occasion, Mr Shafron chose to note his agreement with Allens' advice does not mean that Mr Shafron was always obliged to replicate Allens' work.

b. The suggestion that Mr Shafron was obliged to provide his own, independent, advice is, in any event, undermined by the very terms of ASIC's pleaded case. ASIC alleged only that Mr Shafron was obliged to take one of the three steps identified at ABWhi/192.29; CA [979]. The second alternative was described as a failure *"to obtain advice for Mr Macdonald or the board or provide his own advice to the board"* (emphasis added). If a reasonable person would have understood that Allens had provided advice to the effect that no disclosure was necessary, the very terms of ASIC's pleaded case make clear that no independent advice from Mr Shafron was required.

The Superimposed Inflation Contravention

27. In relation to the superimposed inflation contravention, ASIC's submissions depend heavily on the proposition that an actuarial valuation of liabilities for a *"closed fund"* such as the Foundation requires, or at least makes more important, that superimposed inflation be taken into account (RS [51], [58]). That is an important matter in ASIC's case, for the reason that the only evidence that a rate of greater than zero percent for superimposed inflation should have been taken into account was given on the assumption that a closed fund was in issue.

28. There is, however, absolutely no suggestion or evidence that Mr Shafron knew that the closed nature of a fund was in any way relevant to the approach to be taken to superimposed inflation. The closed nature of the Foundation is thus an entirely irrelevant consideration to the question of Mr Shafron's liability. Indeed, the fact that the approach to superimposed inflation might vary depending on the nature of the fund for which the liabilities are to be valued supports the view that Mr Shafron should not be criticised for failing to second guess the actuarial approach taken by Trowbridge, who were the experts, had a long association with James Hardie, and possessed acknowledged expertise in the estimation of liabilities for asbestos claims.[12] Trowbridge never advised Mr Shafron that its estimates should take into account superimposed inflation or that a prudent estimate would have done so.

29. The second matter upon which ASIC places significant weight is Mr Shafron's knowledge of the fact that JHIL's experience was that claims were increasing at a higher rate than general inflation (RS [56]). The fact that Mr Shafron had observed, based on JHIL's experience alone, an increase in claim costs over and above inflation cannot be regarded as a sufficient basis upon which to impose an obligation to criticise the methodology of independent, expert, actuaries. Trowbridge had access to James Hardie's claim costs extending over many years. The use to be made of that claim costs experience in predicting future liabilities falls squarely within the expert role of actuaries. Mr Shafron cannot reasonably be expected to know what significance a short term trend based on limited experience should have in actuarial analysis, particularly as it has been accepted that he was not actuarially trained (ABWhi/207.8; CA [1069]). The fact that the actuarial evidence at trial, given with full knowledge of the claims data, supported the view that a superimposed inflation rate of zero percent remained appropriate, confirms that Mr Shafron cannot be criticised for failing to give the advice ASIC says was required.

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[12] ASIC's expert witness Dr Taylor at T1119.10-18 [ABBla2/590F-K]