

**ANNOTATED**

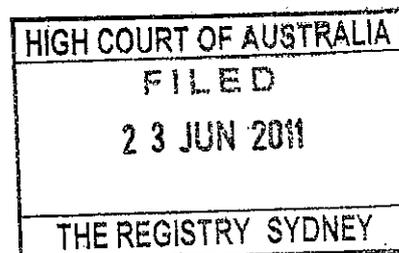
**IN THE HIGH COURT OF AUSTRALIA**  
**SYDNEY REGISTRY**

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

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

**APPELLANT'S CORRELATION EVIDENCE**

**(referred to at paragraph 125 of the Appellant's submissions)**



**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

**Correlation Evidence**

No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
1.		<p>General comments:</p> <p>LJ [194] (ABRed2/460P) - "Because of the strong correlation between those statements and the Draft ASX Announcement, the document that Mr Baxter took to the meeting must have been the 7.24 am Draft Announcement, the Draft ASX Announcement, which was the 7.24 am Draft Announcement minus Mr Baxter's boxes, or the 9.35 am Draft Announcement. Nobody suggested any other document as the source of the correlative statements"</p> <p>LJ [223] (ABRed2/467R) - "I am satisfied 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."</p>	<p>General comments:</p> <p>CA [418] (ABWhi/85.21) - "With two exceptions, the substance of each of the key messages to which Mr Brown agreed in terms of likelihood can in our view readily be seen as sourced, although not always expressed as a key message, in the slides ... slide 29 is the key messages slide"</p> <p>CA [420] (ABWhi/85.49) - "The correlation with the draft news release seen by the judge is in our view weak."</p> <p>CA [421] (ABWhi/86.05) - "... in our view it is rather artificial to find the correlation in the manner the judge did"</p>	
2.	Para 1 - "James Hardie Industries Limited (JHIL)	LJ [153] (ABRed2/449R) - "Mr Brown agreed it was likely that one	CA [418] (ABWhi/85.21) -	Day 27, p 2058, lines 15-

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

**Correlation Evidence**

No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
	announced today that it had established a foundation to compensate sufferers of asbestos-related diseases with claims against the company and fund medical research aimed at finding cures for these diseases"	of the members of management, most likely Mr Macdonald or Mr Baxter, indicated to the meeting that the key message to be communicated included that JHIL had established a Foundation to compensate sufferers of asbestos-related diseases with claims against the company and to fund medical research aimed at finding cures for these diseases. That statement correlates with paragraph 1 of the Draft ASX Announcement."	"[Slide] 29"	22 (ABBlu3/1339I-L)  "Q. And do you accept that it is likely that one of the members of management indicated that one of the key messages to be conveyed by one of the communications you have described was that JHIL had established a Foundation to compensate sufferers of asbestos-related diseases with claims against the company, and to fund medical research aimed at funding cures for these diseases?  A. I believe so, sir."
3.	Para 3 - "The Foundation will have sufficient funds to meet all legitimate compensation claims from people injured by asbestos products manufactured in the past by two former	LJ [154] (ABRed2/450B) - "Mr Brown agreed it was likely that Mr Macdonald or Mr Baxter also said that the Foundation would have sufficient funds to meet all legitimate compensation claims from people injured by asbestos products	CA [418] (ABWhi/85.21) - "[Slide] 29; see also [Slide] 8 (sufficiency of gross assets for future claims) and [Slide] 24 (Mr Loosley's counselling)"	Day 27, p 2058, lines 6-13(ABBlu3/1339E-H)  "Q. Would you accept that it is likely that one of the members of management indicated that

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

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No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
	subsidiaries of JHIL."	manufactured in the past by two former subsidiaries of JHIL. That statement correlates with paragraph 3 of the Draft ASX Announcement."		<p>one of the key messages to be communicated would be that the Foundation will have sufficient funds to meet all legitimate compensation claims from people injured by asbestos products manufactured in the past by two former subsidiaries of JHIL?</p> <p>A. Yes, sir."</p>
4.	Para 4 - "JHIL CEO, Mr Peter Macdonald said that the establishment of a fully-funded Foundation provided the best resolution for all stakeholders"	LJ [155] (ABRed2/450G) - "Mr Brown also agreed it was likely that Mr Macdonald or Mr Baxter said the establishment of a fully funded Foundation provided the best resolution for all stakeholders, which correlates with paragraph 4 of the Draft ASX Announcement. Mr Brown qualified this answer by saying it was in the context of " <i>fully funded</i> " as discussed which he said meant a form of shorthand developed at the meeting to say it was fully funded but in the context of sufficiently funded to the actuarial estimate. But he agreed that the	CA [418] - "[Slide] 29" (ABWhi/85.21)	<p>Day 27, p 2058, lines 24-36 (ABBlu3/1339M-S)</p> <p>"Q. And would you agree it is likely that one of the members of management indicated that one of the terms of the key messages of the proposed communications included that the establishment of a fully funded Foundation provided the best resolution for all stakeholders?</p>

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

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No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
		<p>expression "fully funded" was used at the meeting in relation to the Foundation and it was expected that the message to be conveyed to the market was that the Foundation was fully funded."</p>		<p>A. In the context, sir, of "fully funded" that we just discussed, yes.</p> <p>Q. But you wouldn't dispute that it is likely that words to that effect were indicated by somebody from management as one of the key messages to be conveyed?</p> <p>A. Words to that effect, yes, sir, in the context of the definition of "fully funded".</p> <p>As to definition of fully funded, see Day 27, p 2057, line 2 (ABBlu3/1338C-D)</p> <p>"A. ... 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"</p>

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

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No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
5.	<p>Para 5 - "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.</p>	<p>LJ [156] (ABRed2/4500) - "Mr Brown agreed that it was likely that Mr Macdonald or Mr Baxter said the Foundation provides certainty for people with a legitimate claim against the former James Hardie companies which manufactured asbestos products. That statement correlates with paragraph 5 of the Draft ASX Announcement. But Mr Brown said the term "certainty" was ambiguous. It might mean that a sufficient or certain amount of funds were available and put aside and were not dependent on the fortunes of James Hardie in the future. Or it could mean absolutely certain that there was no possibility whatsoever that the funds were not enough and he would not concur in the company making that suggestion."</p>	<p>CA [418] (ABWhi/85.21) - "[Slide] 29"</p>	<p>Day 27, p 2058, lines 38-47 and p 2059, lines 3-33 (ABBlu3/1339S-1340Q)</p> <p>Q. Would you agree that it is likely that a member of management indicated that one of the key messages was also to this effect:</p> <p>The Foundation provides certainty for people with a legitimate claim against the former James Hardie companies which manufactured asbestos products.</p> <p>A. Sir, my answer to that question has to depend upon the definition of the term "certainty".</p> <p>Q. Before I give you the opportunity to indicate your view on that, would you agree with me that it is likely that a member of</p>

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

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No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
				<p>management indicated that one of the key messages to be conveyed in these communications was words to the effect of:</p> <p>The Foundation provides certainty for people with a legitimate claim against the former James Hardie companies which manufactured asbestos products.</p> <p>A. Within the context of the meaning of the word "certainty", yes, sir.</p> <p>Q. In other words, you accept that it is likely that words to that effect were used, but you wish to indicate what you understood by the word "certainty"; is that right?</p> <p>A. Yes, sir.</p> <p>Q. Feel free to give that indication now.</p>

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

**Correlation Evidence**

No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
				<p>A. Well, I mean, I think the term "certainty" is ambiguous and perhaps there was ambiguity at the time, but "certainty", in one sense, relates to the certainty that a sufficient or a certain amount of funds were available and put aside and were not dependent on the fortunes of James Hardie into the future. If, on the other hand, "certainty" means it is absolutely certain that there is no possibility whatsoever that the funds are not enough, are not sufficient, then that has a different meaning and I don't believe that I would ever concur that the company should be implying that."</p>
6.	Para 9 - "Fund manager, Towers Perrin has been appointed to manage the	LJ [157] (ABRed2/450W) - "Mr Brown agreed that it was likely said that the fund manager, Towers	CA [418] to [419] (ABWhi/85.21-48). Nothing in the slides re	Day 27, p 2060, lines 11-16 (ABBla3/1341G-J)

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

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No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
	Foundation's investments, which will generate investment income and capital growth."	Perrin, had been appointed to manage the Foundation's investments, which would generate investment income and capital growth, a statement that correlates with paragraph 9 of the Draft ASX Announcement."	Towers Perrin- "The first exception is LJ [157], the appointment of Towers Perrin; but that can well have come in management's elaboration of slides concerning generation of investment income and capital growth (slides 12-16)."	"Q. Would you agree it is likely that one of the members of the management team indicated that a key message would include that fund manager Towers Perrin has been appointed to manage the Foundation's investments which will generate investment income and capital growth?  A. Yes, sir."
7.	Para 10 - "In establishing the Foundation, James Hardie sought expert advice from a number of firms, including actuaries Trowbridge, Access Economics and PricewaterhouseCoopers."	LJ [158] (ABRed2/451D) - "Mr Brown agreed it was likely that Mr Macdonald or Mr Baxter said that James Hardie sought expert advice from a number of firms including actuaries, Trowbridge, Access Economics and PricewaterhouseCoopers. That statement correlates with portion of paragraph 10 of the Draft ASX Announcement."	CA [418] (ABWhi/85.21) - "[Slide] 14, [Slide] 15: (Trowbridge analysis and review by PwC and Access Economics)"	Day 27, p 2059, lines 35-40 (ABBla3/1340R-U)  "Q. Do you agree that one of the other key messages identified by management to be conveyed in the communication strategy was that James Hardie sought expert advice from a number of firms, including actuaries, Trowbridge, Access

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

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No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
				<p>Economics and PricewaterhouseCoopers?</p> <p>A. Yes, sir."</p>
8.	<p>Para 10 (cont.) - "This advice supplemented the company's long experience in the area of asbestos and formed the basis of determining the level of funding required to meet all future claims."</p>	<p>LJ [159] (ABRed2/4511) - "Mr Brown agreed that it was likely said that the advice supplemented the company's long experience in the area of asbestos and formed the basis of determining the level of funding required to meet all future claims, which correlates with the balance of paragraph 10 of the Draft ASX Announcement."</p>	<p>CA [419] (ABWhi/85.41) - "The second exception is LJ [159], that the advice supplemented the company's long experience et cetera. If management did speak to that effect at the meeting, it was not clearly an elaboration of the slides. Something may have been said apart from the slides although not from the draft news release, and the correspondence of language would be important."</p>	<p>Day 27, p 2059 lines 42-47, p 2060, lines 1-2. (ABBlu3/1340U-1341C)</p> <p>"Q. Would you agree that in the meeting one of the members of management conveyed as one of the key messages to be conveyed this advice supplemented the company's long experience in the area of asbestos and formed the basis of determining the level of funding required to meet all future claims?</p> <p>A. I don't recall that, sir, but it sounds likely that those types of words were used."</p>

**Australian Securities and Investment Commission v Shafron & Ors**  
**High Court of Australia**

**Correlation Evidence**

No.	Draft ASX Announcement (ABBlu5/2051)	Judgment of Gzell J	Judgment of Court of Appeal	Transcript
9.	Para 11 - "The directors of James Hardie are satisfied that the Foundation will have sufficient funds to meet all future claims," Mr McDonald said"	LJ [160] (ABRed2/451M) - "Mr Brown also agreed that it was likely that Mr Macdonald or Mr Baxter said that the directors of James Hardie were satisfied that the Foundation would have sufficient funds to meet all future claims, a statement correlative with paragraph 11 of the Draft ASX Announcement"	CA [418] - "[Slide] 29" (ABWhi/85.21)	Day 27, p 2060, lines 4-9 (ABBlu3/1341D-F)  "Q. Do you agree that it is likely that one of the members of management indicated that a key message would be that the directors of James Hardie were satisfied that the Foundation would have sufficient funds to meet all future claims?  A. Yes, sir."