



IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

<p>No. S173 of 2011 PETER JAMES SHAFRON Appellant</p> <p>AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Respondent</p>	<p>No. S174 of 2011 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Appellant</p> <p>PETER JAMES SHAFRON Respondent</p>
<p>No. S175 of 2011 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Appellant</p> <p>GREGORY JAMES TERRY Respondent</p>	<p>No. S176 of 2011 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Appellant</p> <p>MEREDITH HELLICAR Respondent</p>
<p>No. S177 of 2011 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Appellant</p> <p>MICHAEL ROBERT BROWN Respondent</p>	<p>No. S178 of 2011 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Appellant</p> <p>MICHAEL JOHN GILLFILLAN Respondent</p>
<p>No. S179 of 2011 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Appellant</p> <p>MARTIN KOFFEL Respondent</p>	<p>No. S180 of 2011 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Appellant</p> <p>GEOFFREY FREDERICK O'BRIEN Respondent</p>
<p>No. S181 of 2011 AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Appellant</p> <p>PETER JOHN WILLCOX Respondent</p>	

APPELLANT'S AMENDED CHRONOLOGY

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No.	Date	Description of event	Document References	Document Appeal Book References	Liability Judgment	Appeal Judgment
1.	31 March 1989	Alan McGregor appointed a director of ABN 60 Pty Ltd (formerly, James Hardie Industries Ltd) (JHIL).	(COMM.020.006.0076) at 0079	ABBlu9/4136G		
2.	2 August 1990	Sir Llewellyn Edwards appointed a director of JHIL.	(COMM.020.006.0076) at 0079	ABBlu9/4135V		
3.	5 May 1992	Meredith Hellicar appointed a director of JHIL.	(COMM.020.006.0076) at 0079	ABBlu9/4135E		
4.	11 May 1992	Peter Willcox appointed a director of JHIL.	(COMM.020.006.0076) at 0079	ABBlu9/4135H		
5.	25 September 1992	Michael Brown appointed a director of JHIL.	(COMM.020.006.0076) at 0079	ABBlu9/4135O		
6.	13 April 1994	Donald Cameron appointed company secretary of JHIL.	(COMM.020.006.0076) at 0082	ABBlu9/4138N		
7.	6 December 1995	Alan McGregor appointed chairman of the board of directors of JHIL.	McGregor s.67 notice; (JHAB.110.001.0003_M) at [1]	ABBlu9/4200H-I		
8.	<u>1 November 1996</u>	<u>Gregory Baxter commenced employment with JHIL as general manager of corporate affairs.</u>	<u>(AFFL001.025.0001_M) at [2]</u>	<u>ABBlu10/4594Q</u>		
9.	1997	Stephen Harman appointed financial controller of JHIL.	Harman outline of evidence (EVID.001.001.0112_M) at [7]-[10]	ABBlu11/4885H-P		
10.	1 March 1997	Phillip Morley appointed chief financial officer of the James Hardie Group.	Morley statement (DOC.03DEF.001.0001) at [4]	ABBlu12/5568Q-V		

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11.	March 1997	Peter Shafron appointed general counsel for JHIL and the James Hardie Group.	(ASE.003.001.0401) at 0423; (JHAB.081.002.0199)	ABBlu7/2901F ABBlu1/299		
12.	<u>April 1998</u>	<u>JHIL Disclosure Policy put in place. At item 16, the disclosure policy set out the directors and officers of the company who constituted the Disclosure Committee with authority to publicly disclose information.</u>	<u>(ALNS.015.003.0070) at 0075.</u>	<u>ABBlu1/104 at 109N</u>	<u>[224], ABRed2/468C-J, [566], ABRe2/558L-S, PJ at [79]-[80], ABRed3/765T-766J</u>	
13.	2 June 1998	Meeting of JHIL board attended by, among others, Hellicar, Willcox, Brown and Morley. McGregor outlined the board's reasons for initiating the corporate restructure of the James Hardie Group under the heading Project Chelsea (Project Chelsea).	(JHAB.056.035.0249)	ABBlu1/112		
14.	30 June 1998	Meeting of JHIL board attended by, amongst others, Hellicar, Willcox, Brown and Morley at which the revised papers presented to the board on 2 June 1998 regarding Project Chelsea were tabled including a draft press release and market announcement together with associated communication material and the board resolved to approve the press release to the ASX.	(JHAB.056.035.0246)	ABBlu1/296		
15.	13 November 1998	Peter Shafron appointed company secretary of JHIL.	(COMM.020.006.0076) at 0082	ABBlu9/4138H		
16.	20 August	Michael Gillfillan appointed a director of JHIL.	(COMM.020.006.0076)	ABBlu9/4135K		

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	1999		at 0079			
17.	20 August 1999	Martin Koffel appointed a director of JHIL.	(COMM.020.006.0076) at 0079	ABBlu9/4135M		
18.	1 November 1999	Peter Macdonald appointed a director of JHIL and employed as chief executive officer.	(COMM.020.006.0076) at 0078	ABBlu9/4134T		
19.	11 November 1999	Gregory Terry appointed as a director of BIL International.	(MISC.012.003.0001) at 0004; M Taylor (AFFI.001.060.0001) at [9]	ABBlu12/5335J-N		[372], ABWhi/76.17-22
20.	<u>17 November 1999</u>	<u>Don Cameron re-appointed with Shafron as joint secretary of JHIL.</u>	<u>D Cameron (EVID.001.001.0031) at 0032S and 0034K</u>	<u>ABBlu12/5229S and 5231K</u>		
21.	3 December 1999	Between meetings board paper entitled " <i>Potential Separation Structure Outline</i> " which referred to " <i>the asbestos litigation poison pill</i> " being " <i>clearly separated from operating assets</i> ".	(JHAB.057.004.0322)	ABBlu1/408	[82], ABRed2/421G-I, [750]-[751] ABRed2/604M	[55] ABWhi/15.37-46
22.	17 February 2000	Terry appointed a director of JHIL.	(COMM.020.006.0076) at 0079	ABBlu9/4135Q		
23.	17 February 2000	Meeting of JHIL board attended by, among others, Brown, Gillfillan (by telephone), Hellicar, Koffel (by telephone), Willcox, Shafron and Morley at which a paper entitled " <i>Project Green - Update</i> " was presented. It listed as a working assumption for Project Green that: " <i>there must be a strong probability that the transactions to establish the structure can be completed, without destruction by spoilers or legal/regulatory difficulties</i> ".	(JHAB.056.035.0140); D Cameron (EVID.001.001.0031_M) at [64]-[65] Brown (DOC.04DEF.001.0001) at [47], [74]-[77]; Hellicar (DOC.06DEF.001.0156)	ABBlu1/410 ABBlu12/5255L-5256I ABBlu13/5706H and 5714L-5715J ABBlu13/5856M-T ABBlu13/5801T-5803T ABBlu1/434E,	[752] - [753], ABRed2/605C-P	

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		Part D (" <i>big picture options</i> ") involved an examination of various options for removing the impact of asbestos litigation on the James Hardie group, including option 8 which was described as a trust structure and option 9 entitled " <i>Company Split/Reorganisation</i> ".	at [87]; Gillfillan (DOC.05DEF.001.0039_M) at [64]-[68] (JHAB.057.001.0001) at 0022, 0025-0026	437M-438V		
24.	13-14 April 2000	<p>Meeting of JHIL board attended by, among others, Hellicar, Willcox, Brown, Gillfillan, Koffel, Terry, Morley and Shafron at which material relating to Project Green was considered. Included in the board papers was a Project Green board paper.</p> <p>Section 4, under the heading "<i>Stakeholder Issues</i>", identified a number of groups as "<i>relevant stakeholders who have an interest in the conduct of James Hardie in its asbestos litigation</i>" and commented that it was "<i>possible that, through a misunderstanding of the elements of Project Green and the separation aspects of the restructure process, or for other reasons, certain groups ("stakeholders") may seek to disrupt or hinder the restructure.... At their worst and most misleading, stakeholders may seek to paint the separation as James Hardie abandoning its responsibilities to claimants. They may allege that JH is leaving behind insufficient assets to meet future liabilities.</i>"</p> <p>Under the heading "<i>stakeholder strategy</i>" the paper stated that a comprehensive communications plan would be prepared "<i>with supporting</i></p>	(JHAB.056.035.0137); Edwards (AFFI.001.032.0001_M) at [30]-[46] (JHAB.057.001.0120) (JHAB.057.001.0190) (JHAB.075.002.0330)	<p>ABBlu2/677 ABBlu10/4451R-4455V</p> <p>ABBlu2/499</p> <p>ABBlu2/577</p> <p><u>ABBlu2/682</u></p>	[754] - [757], ABRed2/605Q-607C	[57], ABWhi/16.01-19[61] - [66], ABWhi/16.47-18.29

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		<p><i>background material and with appropriate assurances likely to prove satisfactory to stakeholders that will be ready for implementation upon public announcement of Project Green. The separation aspects of the restructure will not be emphasized, but we will be able to address them in detail quickly and comprehensively when and if necessary."</i></p> <p>Section 8 of the paper was headed "<i>Market and Stakeholder Issues</i>". It noted that Project Green involves, inter alia, the "<i>separation of asbestos liabilities from core assets</i>". In relation to this it stated: "<i>.... But, the real issue is: can we convince a raft of potentially hostile and emotional stakeholders of the merits and integrity of our case, such that they will not act in a way which prevents us from separating the asbestos liability.</i>"</p> <p>The slide presentation on asbestos resolution for the April 2000 board meeting which discussed funding issues for asbestos and, under the heading "<i>completion risk</i>" (ie it was a risk to the completion of the restructure), referred to "<i>spoilers' tactics</i>" from various stakeholders including "<i>political/legislative interference</i>".</p>				
25.	17 May 2000	<p>Meeting of JHIL board attended by McGregor, Macdonald, Edwards, Hellicar, Willcox (by telephone), Brown, Gillfillan (by telephone), Koffel (by telephone), Terry, Morley and Shafron.</p> <p>The board papers for the meeting included a memo</p>	<p>(JHAB.056.035.0133)</p> <p>(JHAB.070.003.0211)</p>	<p>ABBlu2/697</p> <p>ABBlu2/701</p>	<p>[433], ABRed2/524M-Q [758], ABRed2/607D-J</p>	

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		dated 5 May 2000 from Macdonald concerning Project Green which identified the " <i>base case option still to pass sufficient cash back up from JHNV to JHIL to achieve the structural separation and migration to the Netherlands. The preferred option was "to achieve some form of commercial "take out" of our future asbestos liabilities ahead of our restructure."</i>				
26.	29 June 2000	Geoffrey O'Brien appointed as director of BIL Australia Pty Ltd (BIL)	(MISC.012.004.0001) at 0005			[372], ABWhi/76.17-23
27.	13 July 2000	Meeting of JHIL board attended by, among others, Hellicar, Willcox, Brown, Gillfillan, Koffel, Terry, Morley and Shafron at which Geoffrey Frederick (Dan) O'Brien was appointed as the alternate director for Sir Selwyn Cushing, replacing D B Conway. The board papers included a Project Green update.	(JHAB.070.004.0083)	ABBlu2/998	[759], ABRed2/607J-R	
28.	18 August 2000	Meeting of JHIL board attended by, among others, McGregor, Macdonald, Hellicar, Gillfillan, Terry, Brown, O'Brien (as alternate for Cushing), Morley and Shafron, Koffel and Willcox were noted as apologies. A slide presentation titled " <i>James Hardie Project Green</i> " was made to the meeting. The part of the presentation headed " <i>Stakeholder Issues</i> " was presented by Macdonald and Baxter. It included the following: "• Trust	(JHAB.056.035.0127) Edwards (AFFI.001.032.0001_M) at [58] Morley (DOC.03DEF.001.0001) at [26(f)] (JHAB.075.002.0070) (JHAB.075.002.0034)	ABBlu3/1079 ABBlu10/4458G-4460L ABBlu12/5574J ABBlu3/1082 ABBlu3/1043	[265] - [267], ABRed2/481J-482J [433], ABRed2/524M-Q [760] - [763], ABRed2/607R-609R [767], ABRed2/610M-Q [770], ABRed2/611D-J	[63]-[64] ABWhi/17.26-18.13 [67], ABWhi/ 18.31-34

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		<ul style="list-style-type: none"> ◦ <i>could have broad appeal but doesn't provide certainty and finality for shareholders;</i> <i>"Stakeholders - What have we learned</i> • <i>Our preliminary case is currently inadequate</i> • <i>we cannot argue strongly that the funds left behind will be sufficient under every conceivable scenario".</i> 				
29.	12 October 2000	<p>Email from Shafron to Peter Cameron and David Robb (Allens) entitled "<u>Asbestos: Continuous Disclosure Policy</u>" stating:</p> <p><u>"David/Peter,</u></p> <p><u>A question was raised at the last Board meeting about whether the draft Trowbridge report raises any disclosure issues for us under the listing rules. In my view, while it raises issues, we are not compelled to make any disclosure in respect of it. I have drafted a brief note to Peter setting out my thinking. Could you please look at the note and tell me if you are comfortable with it."</u></p>	(JHAB.103.001.0204)			
30.	12 October 2000	<p>Email from P Cameron to Shafron, Robb and George Frangeskides (Allens) entitled "<u>Asbestos: Continuous Disclosure Policy</u>" stating:</p> <p><u>"I have looked at your note and am broadly comfortable with your conclusions. There are a few additional points I would note ..."</u></p>	(JHAB.103.001.0207)			
31.	October 2000	Memorandum from Shafron to members of the	(JHAB.070.004.0432)	ABBlu3/1120	[268],	

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		board advised that the Draft 2000 Trowbridge report did not need to be disclosed to the market because the work " <i>...does not produce any definite outcomes. It is based on important epidemiological models and a range of predictions of future claim numbers and claim costs</i> ", and later, " <i>...it is insufficiently definite in that it is heavily based upon assumptions subject to considerable uncertainties</i> ".			ABRed2/482K-P	
32.	15 November 2000	<p>Meeting of JHIL board attended by, among others, McGregor, Macdonald, Brown, Gillfillan, Hellicar, Koffel (by telephone), O'Brien (as alternate for Cushing), Terry, Willcox, Shafron and Morley. A slide presentation entitled "<i>Project Green Board Presentation - November 2000</i>" was presented to the meeting.</p> <p>Under the heading "<i>Communications strategy</i>" the slides addressed, amongst others, the following topics:</p> <p style="padding-left: 20px;"><i>"Pre-Announcement</i></p> <ul style="list-style-type: none"> - <i>pre-announcement holding statement to deal with a leak</i> - <i>fake soundings before announcement among major stakeholders</i> - <i>anticipate non-investor concerns and prepare response e.g. creditors, government</i> 	(JHAB.086.001.0001) at 0013	ABBlu3/1138F-H	[772] - [778], ABRed2/611N-6130	[68] - [70], ABWhi/18.35-19.03

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		<p><i>Public announcement</i></p> <ul style="list-style-type: none"> - lower key announcement than Chelsea - news release, information pack, investor/media briefings Sydney/Melbourne - back pocket briefings notes on special issues e.g. corporate tax, capital gains tax status of shareholders, ATO, asbestos, creditors, corporate migration, listed ADRs etc... <p><i>Communications strategy (continued)</i></p> <ul style="list-style-type: none"> • use of other news/announcements during period between announcement and EGM to refocus attention on business e.g. fibre cement capacity expansion..." 				
33.	5 December 2000	<p>UBS Warburg retained by JHIL as its "<i>general and financial advisor</i>" in relation to, among other matters, Project Green. The letter of engagement said:</p> <p><i>"The Company [JHIL] will ensure that all announcements and documents published or statements made by it or on its behalf in the course of, and relevant to, the Engagement will only be made or published after discussion with UBS Warburg."</i></p>	(UBS.023.003.0650) at 0653M	ABBlu3/1183 at 1186M	PJ at [76], ABRed3/765D-G	[180], ABWhi/39.44-51
34.	13 December 2000	In the December 2000 between meetings board paper, Macdonald included a memorandum to	(JHAB.112.001.0217) (JHAB.112.001.0219)	ABBlu3/1205 ABBlu3/1207	[84]-[85] ABRed2/421N-X	[72]-[73], ABWhi/19.08-19.33

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		<p>members of the board of JHIL foreshadowing that management would seek board approval in January 2001 to establish a trust over the shares held by JHIL in James Hardie & Coy Pty Limited (Coy), a wholly owned subsidiary of JHIL that manufactured and sold asbestos products and became subject to damages claims for asbestos related diseases (asbestos claims), and thereby deconsolidate it from the James Hardie Group.</p> <p>There were various proposals developed throughout 2000 to separate from the James Hardie group, in whole or in part, those subsidiaries the subject of asbestos claims. These proposals were known internally as Project Green.</p> <p>To move ahead on restructuring the memorandum proposed that the following steps be undertaken: 1. Creation of a Trust over JH&Coy. 2. Accounting for Trust Creation. 3. Public Position: "<i>Press releases would explain the creation of the trust as providing certainty for creditors and potential claimants that the assets of JH&Coy are irrevocably secured for their benefit.</i>"</p>	<p>Edwards (AFFI.001.032.0001_M) at [66]</p>	<p>ABBlu10/4463Q</p>	<p>[87], ABRed2/422Q-U [269], ABRed2/482Q-U [792], ABRed2/617P-S</p>	
35.	18 December 2000	<p>Email from Gregory Baxter to Macdonald, Morley, Shafron and Anthony Sweetman (UBS) attaching first draft of a media release about the establishment of a charitable trust to compensate victims of asbestos related diseases and fund</p>	<p>(UBS.010.001.0074); (UBS.010.001.0076); (UBS.010.001.0078); (UBS.010.001.0081); Baxter (AFFI.001.025.0001 M)</p>	<p>ABBlu3/1209; ABBlu3/1211; ABBlu3/1213; ABBlu3/1216; ABBlu10/4602R</p>	<p>[434], ABRed2/524Q-Y</p>	<p>[81], ABWhi/21.40-44</p>

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		medical research (trust).	at [49]			
36.	8 January 2001	<p>Email from Baxter to Macdonald, Shafron, Morley, Ian Wilson (UBS) and Sweetman entitled "<i>Latest communication strategy</i>" attaching documents entitled "<i>Announcement Strategy and Tactics</i>" and "<i>Draft News Release</i>". The "<i>Announcement Strategy and Tactics</i>" document contained recommendations on how to announce the establishment of the trust with the aims of: "• <i>attracting as little attention as possible beyond the financial markets; • positioning the initiative as a 'business' news as opposed to a 'general' news story; • having financial markets recognize and reward the certainty and finality of separation; • managing fallout and minimizing damage to JH's reputation generally; and • generally minimizing the potential for government intervention.</i>"</p> <p>The document recommended that the announcement be made on Friday, 16 February to "<i>coincide with the announcement of JHIL's Q3 results and the related management presentation to analysts and business media.</i>"</p> <p>In relation to "<i>approach</i>", it was noted that: "<i>It is possible that a 'hard' sell to investors and a 'soft' sell to others are not mutually exclusive.</i>"</p> <p><i>We aim to achieve this by positioning the trust to shareholders and the investment community as effectively ending JHIL's asbestos liabilities. We will use the Q3 management presentation in</i></p>	<p>(JHAB.T673.002.0367) (JHAB.T673.002.0373) Ashe (EVID.001.001.0002_M) at [53] Baxter (AFFI.001.025.0001_M) at [51] (JHAB.T673.002.0368)</p>	<p>ABBlu3/1261 ABBlu3/1267 ABBlu10/4603F ABBlu3/1262</p>		

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		<p><i>which to do this.</i></p> <p><i>At the same time, the separate announcement on the trust which will be aimed at a wider, general and more hostile audience, will be positioned as providing special funds for compensation and medical research for the sole benefit of victims of asbestos diseases."</i></p>				
37.	9 January 2001	<p><u>Email from Baxter to P Cameron attaching the latest communications strategy stating:</u></p> <p><u>"Peter, I would very much appreciate your comments as soon as possible".</u></p>	<u>(ALNS.084.004.0080)</u>	<u>ABBlu3/1270</u>		
38.	9 January 2001	<p>Macdonald sent a memorandum to members of the JHIL board attaching the board papers for the 17 January 2001 board meeting.</p> <p>The board papers included a paper titled <i>Proposed Trust Structure Update</i>. It considered the establishment of a stand-alone trust company to manage the asbestos liabilities of the James Hardie group and separate them from the group. Under the proposal JHIL would make a gift to the trust of its shares in Coy and Jsekarb Pty Ltd (Jsekarb), another wholly owned subsidiary of JHIL that manufactured and sold asbestos products and became subject to asbestos claims, and the assets of Coy and Jsekarb would be dedicated to meeting existing and future asbestos claims.</p> <p>This proposal was known as the Net Assets Model. A feature of the proposal was that only</p>	<p>JHAB.112.001.0277 JHAB.112.001.0280 JHAB.112.001.0310</p>	<p>ABBlu3/1276 ABBlu3/1277 ABBlu3/1307</p>	<p>[86], ABRed2/422B-P [89], ABRed2/423I-L [793] - [794], ABRed2/617S-618H</p>	<p>[74]-[76], ABWhi/19.33-20.11 [81], ABWhi/21.40-44</p>

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		the net assets of Coy and Jsekarb would be made available to meet present and future asbestos claims. A draft announcement to the ASX regarding the separation proposal was contained in the board papers for the January 2001 board meeting.				
39.	11 January 2001	Email from Shafron to Peter Cameron & Robb (cc Baxter, Morley, Harman) titled " <i>1. Dan O'Brien issues 2. Session this Friday</i> " which addressed a number of issues raised by O'Brien, and proposed a hook up on Friday, 10 am Australian time.	(ALNS.084.002.0242); Baxter (AFFI.001.025.0001_M) at [53]	ABBlu3/1329 ABBlu10/4603L		
40.	15 January 2001	Brown sent a facsimile to Morley which included a list of issues for discussion regarding the separation proposal contained in the board papers for the 17 January 2001 board meeting. It stated, amongst other things: " <i>Basic structure and purpose of trust - proposed public statement on this (is it sufficient?)</i> "	JHAB.066.001.0449	ABBlu3/1330	[143], ABRed2/447M-P	
41.	16 January 2001	Audit Committee meeting attended by, amongst others, Morley, Brown, McGregor, Shafron, Macdonald and Gillfillan (by telephone) at which Macdonald, Morley and Shafron " <i>outlined a stand alone trust company concept that could support asbestos related medical research and manage the asbestos liability of subsidiary companies.</i> "	(JHAB.056.035.0255)			
42.	17 January 2001	JHIL board meeting attended by McGregor, Macdonald, Hellicar, Willcox, Koffel, Gillfillan, Terry, Brown, O'Brien (as alternate for Cushing),	Baxter (AFFI.001.025.0001_M) at [54]-[64]	ABBlu10/4603P-4605S ABBlu3/1333	[86] - [89], ABRed2/422B-423M	[74] - [81], ABWhi/19.33-21.44 [84],

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		<p>Morley, Shafron, Baxter, Wilson, Sweetman, Peter Cameron and Robb.</p> <p>At the board meeting the separation proposal contained in the board papers was discussed. A PowerPoint presentation headed "<i>Board Presentation Asbestos Trust Structure Discussion</i>" was given which discussed these topics. The Net Assets Model was rejected by the board and the chairman requested "<i>management to continue developing the concept and to report progress, particularly in relation to funding, at the February meeting.</i>" Brown was dissatisfied with the communication strategy in the board papers for the 17 January 2001 meeting because it did not convey that there would be certainty of funding. Willcox agreed that he had said words to the effect that if they made a decision in which they did not provide sufficient funds to cover all of the expected future debts then there would be a negative reaction to it when it was announced. Morley made handwritten notes. They record Willcox as stating: "<i>PR questions are important</i>" and "<i>potential for Govt legislation</i>" linked to "<i>becomes a practical issue</i>" "<i>JHIL cannot say all debts are covered</i>". Hellicar is recorded as saying "<i>appearance that JHIL looks guilty</i>" and Willcox as again stating it was a "<i>practical question</i>".</p>	<p>(JHAB.056.035.0112) (JHAB.112.001.0278) (JHAB.066.001.0497) (COMM.014.002.0238)</p>	<p>ABBlu3/1332 ABBlu3/1369 <u>ABBlu3/1365</u></p>	<p>[144], ABRed2/447Q-448G [179], ABRed2/456F-O, [270] - [272], ABRed2/482V-483M, [793] - [798], ABRed2/617S-619J [803], ABRed/620M-Q [807]-[808] ABRed2/621K-S</p>	<p>ABWhi/22.09-20 [86], ABWhi/22.24-23.19 [91], ABWhi/23.47-51 [95] - [99] (especially at [99]) ABWhi/24.26-25.41</p>
		<p>The minutes of the meeting record that, inter alia, the following occurred:</p>	<p>(JHAB.066.001.0497)</p>	<p>ABBlu3/1369</p>		

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		<ul style="list-style-type: none"> • the directors noted a paper discussing a stand alone trust company that could support asbestos related medical research and manage the asbestos liability of subsidiary companies; • the chairman noted that the concept appeared to have some merit, but that the question of funding for the Foundation required more work. He requested management to continue developing the concept and to report progress, particularly in relation to funding, at the February board meeting. <p>A PowerPoint presentation entitled "<i>Board Presentation Asbestos Trust Structure Discussion</i>" was made. The slides included the following:</p> <ul style="list-style-type: none"> • in part 7 "<i>Legal Issues and Risks</i>". One of the slides was headed "<i>Key risks</i>" and stated: <i>"Separation per se not problematic, issue is statement not to support COY"</i> • 2 slides following the "<i>Key risks</i>" slides were headed "<i>Communications Strategy</i>" and identified the following: <i>"Strategic aims:"</i> <ul style="list-style-type: none"> ◆ <i>Positioning the initiative as a 'business' news as opposed to a 'general' news story</i> ◆ <i>Having financial markets recognise and reward the certainty and finality of</i> 				

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		<p style="text-align: center;"><i>separation</i></p> <ul style="list-style-type: none"> ◆ <i>Attracting as little attention as possible beyond the financial markets</i> ◆ <i>Managing fallout and minimising damage to James Hardie's reputation generally</i> ◆ <i>Minimising the potential for government intervention"</i> <p><i>"Key issues:" included:</i></p> <p>...</p> <p><i>"Key stakeholder management</i></p> <ul style="list-style-type: none"> - <i>government</i> - <i>law firms, unions and other defendants</i> - <i>organisations to contact on announcement day</i> - <i>employees"</i> <p>Under the heading <i>"Market Reaction"</i> the slides identified the <i>"Positives:"</i> to include:</p> <ul style="list-style-type: none"> ◆ <i>"Likely to be interpreted as removing or solving JHIL's asbestos liabilities (subject to negative stakeholder reactions and changes in legal position)"</i> and <i>"Removal of the asbestos poison pill"</i>. The <i>"Negatives"</i> included <i>"Negative stakeholder reactions"</i>. 				

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		<p>Included in the board pack for this meeting was a paper entitled "<i>James Hardie Industries Limited January Board Paper: Proposed Trust Structure Update 10 Jan 2001</i>". The paper discussed the separation proposal. It described the trust proposal as involving:</p> <ul style="list-style-type: none"> • following the initial settlement of the trust, the making of a gift by JHIL to the trust comprising JHIL's shares in Coy and Jsekarb, and cash of approximately \$2 million to fund research into asbestos related diseases; • total assets of \$214 million being made available to meet asbestos claims, consisting of Coy (Amaca) and Jsekarb's (Amaba's) "<i>cash, receivables and assets</i>"; • under the heading "<i>Overview of Trust Proposal</i>" the paper stated, inter alia: Clarify JHIL's position in regard to asbestos liabilities: "<i>The announcement of the Trust would clarify the liability of James Hardie relating to asbestos liabilities to the market (ie that the JHIL Group's liability is for practical purposes limited to the net assets of JH & Coy and Jsekarb). This should provide greater certainty to investors in JHIL significantly mitigating if not entirely removing the "uncertainty discount" relating to the unknown quantum of future liabilities that JHIL may incur.</i>" • the ongoing uncertainty in relation to the 				

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		<p>asbestos liabilities was described as resulting in <i>"an adverse impact on the JHIL share price"</i>. The desired impact of the announcement was described as follows: <i>"Our most desired outcome would be to have the analysts walk away from the presentation understanding that the establishment of the Trust means that JHIL no longer has any significant liability for asbestos. If this is achieved, it could lead to a rise in the JHIL share price on the day."</i></p> <ul style="list-style-type: none"> • in part of the board paper headed "Risks" under the heading "Stakeholder Issues and Possible Legal Responses" it was noted that: <p><i>"The creation of the Trust would, however, carry with it the message that JHIL would not support JH & Coy and Jsekarb in the event that funds prove to be insufficient (see "Communications Strategy" below). JHIL has never committed to support these subsidiaries and has vigorously defended suits seeking to make it liable for those or other subsidiaries' asbestos exposure. But, there is still likely to be a negative reaction to any message of non support.</i></p> <p><i>The intention would be to execute and announce the Trust simultaneously....";</i></p> • the paper considered legislative intervention as the most likely attack on the proposal: <p><i>"The most likely basis for attack (and</i></p> 				

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		<p><i>management perceives this risk to be low) would be political and legislative.</i></p> <ul style="list-style-type: none"> • the paper also contained a part headed "<i>Communications Strategy</i>", with sub-headings "<i>Announcement Strategy and Tactics</i>", "<i>Timing</i>", "<i>Approach</i>", "<i>Positioning</i>", "<i>Key Stakeholder Management</i>", and referred to a draft announcement and draft Q&A annexed as Attachment A. Under the heading "<i>Introduction</i>", the communications strategy stated, inter alia: <ul style="list-style-type: none"> <i>"The following recommendations on how to announce any establishment of a Trust were developed with the aims of</i> • <i>positioning the initiative as a "business" news as opposed to a "general" news story;</i> • <i>having financial markets recognise and reward the certainty and finality of separation;</i> • <i>attracting as little attention as possible beyond the financial markets;</i> • <i>managing fall out and minimising damage to James Hardie's reputation generally; and</i> • <i>minimising the potential for government intervention..."</i> 				

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		<ul style="list-style-type: none"> • under the sub-heading "<i>Positioning</i>", the paper provided as follows: "..... <i>It is possible that a 'hard' sell to investors and a 'soft' sell to others are not mutually exclusive.</i> <i>We would aim to achieve this by positioning the Trust to shareholders and the investment community as effectively ending JHIL's asbestos liabilities. We would use the Q3 management presentation in which to do this.</i> <i>At the same time, the separate announcement on the Trust, which would be aimed at a wider, general and more hostile audience, would be positioned as providing special funds for compensation and medical research for the sole benefit of victims of asbestos diseases.</i> <i>We propose to name the Trust the Medical Research and Compensation Trust to help us achieve this positioning.</i> <i>We would also use the management presentation and announcement to correct some of the more poisonous myths about James Hardie and asbestos which are often advanced by plaintiff law firms. We would use these messages as often as possible when communicating our position to general news and current affairs media."</i> 				

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43.	24 January 2001	<p>Macdonald sent O'Brien an email in relation to a potential capital raising stating, inter alia, that any discount to market of the shares <i>"would probably need to be towards the top end. This may be driven higher by any uncertainty regarding a concurrent announcement of the foundation"</i>.</p> <p>O'Brien responded with an email, which he copied to Terry, addressing the capital raising issue but also stating that in relation to <i>"Project Green"</i> and under the heading <i>"Linking the trust and the restructuring announcements"</i> that <i>"We believe that these 2 events should be announced in parallel...."</i></p>	(OBRG.002.001.0003)	AABlu4/1434		
44.	25 January 2001	<p>Email from Jane Rotsey to Ashe entitled <i>"Foundation Strategy Document"</i> attaching document for consideration and discussion that afternoon entitled <i>"MRCF Communication Strategy Outline"</i>. The recommended communication strategy for the Foundation immediately post announcement was to <i>"shut the story down as quickly and effectively as possible."</i> Its most <i>"forceful messages"</i> should include <i>"that the creation of the Foundation creates certainty for people injured by asbestos"</i>.</p>	(JHAB.339.006.2392); (JHAB.339.006.2393); (JHAB.T382.001.2200); Ashe (EVID.001.001.0002_M) at [60]; Rotsey (EVID.001.001.0189_M) at [20]	ABBlu12/5320J		
45.	31 January 2001	<p>Email from O'Brien to Macdonald (cc Terry) setting out the position of BIL on, among other things, the trust. Under the heading <i>"2. Project Green"</i> it was noted in relation to <i>"(3)Detail of the trust and Restructure"</i> that BIL was happy with the latest version with a number of caveats</p>	(ALNS.006.074.0310)	ABBlu3/1424		

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		including " <i>Further discussion on the PR plans and reaction to 'worse case scenario outcomes'</i> ".				
46.	31 January 2001	Blanchard sent an email to Shafron entitled " <i>RE: Trust Action List</i> " asking: <i>'are you, or should we [Allens], do a first draft of the various minutes of meeting?'</i>	<u>ALNS.051.001.0087</u>	<u>ABBlu4/1742M</u>		[471], <u>ABWhi/94.02-06</u>
47.	3 February 2001	Email from Baxter to Rotsey, Macdonald, Shafron and others entitled " <i>Latest Paper</i> " attaching documents entitled " <i>Communication Strategy</i> "; " <i>Draft Key Messages</i> "; and " <i>Trust Creation Draft Questions and Answers 24 January 2001</i> ". The attached draft of the communications strategy provided, among other things, as follows: <i>"At the January Board meeting, Directors raised concerns about whether the communication strategy presented at that time would be able to neutralize potential stakeholder opposition effectively. This paper also addresses these issues.</i> <i>However, the central conundrum remains the same; we will not, under any scenario, be able to provide key external stakeholders with absolute certainty that the funds set aside to compensate victims of asbestos diseases will be sufficient to meet all future claims.</i> <i>With this in mind, we have analysed how key external stakeholders are likely to react to this uncertainty. From this point, we have</i>	Rotsey (EVID.001.001.0189_M) at [21]; Baxter (AFFI.001.025.0001_M) at [71]; (JHAB.T673.002.0338); (JHAB.T673.002.0339);	ABBlu12/53200 ABBlu10/4606Q ABBlu4/1755 ABBlu4/1756		[186], ABWhi/40.31-36

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		<i>developed our strategy."</i>				
48.	5 February 2001	Macdonald sent an email to O'Brien entitled " <i>Privileged and Confidential - Board Paper Outline - Project Green 31 January 2001</i> " attaching a draft of a board paper on the separation and restructuring proposal for the February 2001 board meeting.	OBRG.002.001.0006 OBRG.002.001.0007	ABBlu4/1806 ABBlu4/1807		
49.	5 February 2001 at 1.52pm	Macdonald sent an email to Shafron, Morley and Baxter and copied Wilson, Sweetman and Robb entitled " <i>BIL Discussions</i> ". The email included the following statement: <i>"I have review the latest draft of the February Board paper on separation and restructuring with Dan O'Brien."</i>	ALNS.005.057.0059	ABBlu4/1812		
50.	Early February 2001	The board papers for the February 2001 board meeting were sent to the directors in early February 2001. The board papers included a paper titled " <i>Project Green Board Paper</i> " produced by Macdonald and dated 5 February 2001. The separation proposal contained in the January 2001 board papers was refined and the recommendation by management to the board was that: 1) the shares held by JHIL in Coy and Jsekarb be vested to a foundation to be known as the Medical Research and Compensation Foundation (the Foundation), which would manage the companies' assets; and	JHAB.112.001.0340	ABBlu4/1439	[90] - [93], ABRed2/423M-425J	[103], ABWhi/26.11-13 [104] - [123], ABWhi/26.14-29.23

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		<p>2) an additional sum of NPV \$70M be paid over time to Coy in return for an indemnity and covenant not to sue JHIL and agreement to take JHIL if it was put to the Foundation in the future with no subsidiary companies (known as the Deed of Covenant and Indemnity or DOCI).</p>				
		<p>The board papers included a paper entitled "<i>Project Green Board Paper</i>" which, under the heading "<i>4. Recommended Solution and Timing</i>", stated (0499):</p> <p><i>"... it is recommended that the JHIL Board agree to the creation of the Foundation as its Thursday 15 February meeting for announcement together with JHIL's Q3 results on Friday 16 February"</i></p> <p>And at 0500:</p> <p><i>"James Hardie needs to act now. Delaying creation of a Foundation past financial year end [ie 31 March 2001] significantly increases the risk of ED 88 complications. Latest intelligence is that ED 88 will be promulgated before the end of this financial year and that CSR will significantly increase its asbestos provisioning by early adopting ED 88 and disclosing details at its full year results announcement in May."</i></p> <p>Attachment B to that paper was entitled "<i>Communications Strategy</i>" (0509). It addressed, inter alia, media and stakeholder approach (0513 to 0519) and then outlined the strategy itself (0520) and contained references to the fact that</p>	(JHAB.112.001.0497)	ABBlu4/1595		

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		there would be an announcement:				
		<ul style="list-style-type: none"> • 0521 (<i>"the announcement will be made on Friday, 16 February to coincide with JHIL's Q3 results"</i>); • 0521 (<i>"We will announce the Q3 results and separation simultaneously at 10.00 am, ahead of the 11.00 am management presentation...."</i>); • 0522 (<i>"There will be a separate general news release from JH about the foundation for these general news audiences..."</i>); • 0536 (<i>"on the day of the announcement...."</i>); • 0536 (<i>"...in the JHIL News Release..."</i>). 		<p>ABBlu4/1619H</p> <p>ABBlu4/1619L</p> <p>ABBlu4/1620S</p> <p>ABBlu4/1634E</p> <p>ABBlu4/1634G</p>		
51.	7 February 2001 at 12.51pm	Julian Blanchard sent an email to Shafron, copied to others, copied to Robb and Patrice Mowat, entitled " <i>Project Green - minutes of directors' meeting – JHIL</i> " attaching draft minutes of the 15 February 2001 JHIL board meeting.	ALNS.005.056.0455 ALNS.005.056.0456	ABBlu10/1824 ABBlu10/1825		
52.	7 February 2001	Meeting between Stephen Loosley and David Pigott of PwC and Baxter and Ashe during which comments to the following effect were made by Loosley: " <i>You have to demonstrate certainty that there will be sufficient funds.</i> " and " <i>You will need an independent assessment of the figures produced by JHIL to be undertaken in order to resolve any issue of certainty. Perhaps Towers Perrin could sign off</i> ".	(PIGG.001.001.0001); Ashe (EVID.001.001.0002_M) at [70]-[71]; Baxter (AFFI.001.025.0001_M) at [76]-[78]; Pigott (AFFI.001.015.0001_M) at [5]-[19]	ABBlu4/1830 ABBlu10/4608H-S		[144] - [147], ABWhi/33.08-33.37

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53.	9 February 2001	Macdonald, Shafron and Ashe met with Loosley and Pigott of PwC's strategic advice and public policy group. Loosely advised them to attempt to get independent verification of the funding outcomes they had modelled. He also stated that: <i>"This is all about giving certainty and confidence to the market and that James Hardie is doing the right thing"</i> .	Pigott (AFFI.001.015.0001_M) at [21]		[96], ABRed2/425V-Y	[148], ABWhi/33.38-43
54.	10 February 2001 at 2.32pm	Macdonald sent an email to Baxter, copied to Shafron, Morley, Sweetman, Wilson and Ashe, entitled <i>"Confidential - Stephen Loosley and David Pigott Meeting"</i> regarding the meeting with Loosley on 9 February 2001. The email included the following statement under the heading <i>"4 Funding - will it be enough? and independent verification"</i> : <i>"Stephen felt the new numbers put us in a very powerful position. We should attempt to get independent verification of the funding outcomes we had modelled (Access Economics, Grant Samuel, PwC were suggestions) so that funding outcomes were not solely on our say so. For example, we should be ready to say 'James Hardie's Board has taken a very responsible and fair approach. They have provided for future victims. Two independent reviews have agreed with James Hardie's calculations - that in all probability there will be sufficient money for victims?'"</i> .	JHAB.213.001.0133 Baxter (AFFI.001.025.0001_M) at [80] (JHAB.L006.016.2262)	ABBlu10/4609D ABBlu5/1885	[97], ABRed2/426C-H [435], ABRed2/435E-J	[149], ABWhi/33.45-51 [150] ABWhi/34.01-14

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55.	12 February 2001	Email from Baxter to LJ Loch (cc Ashe, Macdonald, Shafron) attaching document entitled " <i>Revised Key Messages</i> ". The email summarised a number of important developments. The document attached to the email provided, inter alia: <i>"- James Hardie has effectively resolved its asbestos liability for the benefit of shareholders and future claimants...</i>	(HAWK.002.001.0361); Baxter (AFFI.001.025.0001_M) at [82]; (HAWK.002.001.0363)	ABBlu5/1888 ABBlu10/4609L ABBlu5/1890		[152], ABWhi/34.18-30
56.	13 February 2001	Robb sent an email to Shafron and Blanchard entitled " <i>FW: Project Green – Minutes of Directors Meeting – JHIL</i> " attaching a draft of the JHIL board minutes	JHAB.L006.030.2280 JHAB.L006.030.2281	ABBlu5/1898 ABBlu5/1899		
57.	13 February 2001	Meeting of JHIL management with incoming directors of the Foundation. Attended by Attrill, Edwards, Michael Gill, Dennis Cooper, Peter Jollie, Shafron, Morley, Robb, Minty, Marshall and Tony Bancroft (Mallesons Stephen Jacques).	Marshall (AFFI.001.013.0001_M) at [43]-[49]; Attrill (AFFI.001.024.0001_M) at [233]; (LMG.002.004.0305); Cooper (AFFI.001.028.0001_M) at [52]-[65]; (MRCF.007.001.0321); Minty (AFFI.001.014.0001_M) at [63]-[75]; (TROW.012.005.0058); Edwards (AFFI.001.032.0001_M) at [127]-[150];	ABBlu10/4743L ABBlu10/4647G- 4650P ABBlu10/4481J- 4487J		

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			(EDWA.001.002.0007); (EDWA.001.003.0035)			
58.	13 February 2001	Email from Melissa Wheeler to Rotsey, Baxter, Ashe and others calling an " <i>all hands on deck</i> " meeting to finalise the draft announcement and communication strategy documents.	(JHAB.339.006.2002)	ABBlu5/1906	[98], ABRed2/426I-N	[188], ABWhi/40.41-45
59.	14 February 2001	Baxter, Ashe and Wheeler met with Rotsey and Brian Tyson (from Gavin Anderson). Action points from that meeting prepared by Wheeler indicated that the tasks of revising for comment the media release of JHIL, the media release of the Foundation, the key messages and the Q&A had not been completed.	JHAB.034.001.0099	<u>ABBlu5/2041</u>	[98], ABRed2/426I-N	
60.	14 February 2001 at 10.16am	<u>Shafron sent an email to Baxter, Ashe and Macdonald, copied to Morley and Harman, entitled "Public reference to experts". The email included the following statement:</u> <i>"I think you know that we really should get express permission from our experts before mentioning them publicly.</i> <i>As for Trowbridge, they have yet to give that permission. If we do intend to refer to them in public documents or discourse then please let me know what we intend to say and I will try to clear it with David Minty.</i> <i>Same will apply to Access and PwC."</i>	<u>JHAB.L006.036.0669</u>	<u>ABBlu5/1952</u>	[99], <u>ABRed2/426O-U</u>	
61.	14 February 2001 at	Baxter sent a reply to the email sent by Shafron at 10.16am and copied in all the recipients of the	JHAB.066.002.0246 Ashe	ABBlu5/1957	[101], ABRed2/426X-	[943],

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	10.21am	earlier email. The email included the following statement: <i>"you will get to see all the documents to be released and this will be the final form of approval we need - if we can find out in advance what they are prepared for us to say that might save time later"</i>	(EVID.001.001.0002_M) at [85]; Baxter (AFFI.001.025.0001_M) at [88] (JHAB.235.002.0218)	ABBlu10/4610N	427I	ABWhi/184.19-28
62.	14 February 2001 at 10.35am	Shafron sent a reply to the email sent by Baxter at 10:21am. The email included the following statement: <i>"I understand. However, before I go to Trowbridge do we have any specific language? The wording you mentioned could be a little problematic. In the case of Trowbridge, something like "based on projected future cashflows provided by Trowbridge Consulting" may be OK, ir "based on key inputs from Trowbridge. Steve should talk to you about Access or PwC."</i>	JHAB.1006.036.0669	ABBlu5/1953		[944], ABWhi/184.29-32
63.	14 February 2001 at 11.00am	Shafron forwarded the email sent from Robb on 13 February entitled "FW: Project Green – Minutes of Directors Meeting – JHIL" attaching a draft of the JHIL board minutes to Susan Stevenson with a request that she 'Hardi-ize' the documents.	JHAB.L006.030.2280 JHAB.L006.030.2281	ABBla5/1898 ABBla5/1899		
64.	14 February 2001 at 1.00pm	Meeting of the JHIL audit committee attended by McGregor, Macdonald, Brown, Gillfillan, Shafron, Morley and Stephen Harman. The minutes record that Morley and Harman explained the latest	Harman (EVID.001.001.0112_M) at [145]-[150]; (JHAB.065.003.0199);	ABBlu11/4915F-4916F ABBlu5/2047 ABBlu5/2048		

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		version of the Cashflow Model.	(JHAB.065.003.0200); (JHAB.065.003.0201); (JHAB.065.003.0202); (JHAB.056.035.0253)	ABBlu5/2049 ABBlu5/2050; ABBlu5/2004		
65.	14 February 2001	Ewen Waterman of Access Economics sent a draft report to Ashe, copied to Harman, commenting on the Memorandum of the Cashflow Model for projecting future cashflows.	ACCE.001.001.0020	ABBBlu10/2059		
66.	14 February 2001	David Brett of PwC sent a draft letter to Harman commenting on the reasonableness of the Cashflow Model.	JHAB.065.003.0273 Brett (AFFL001.026.0001_M) at [48]-[50]	ABBlu10/2061 ABBlu10/4520J-V		
67.	14 February 2001 at 7.28pm	Rotsey sent an email to Baxter and Ashe, copied to <u>Brian Tyson, Emma Burlington and Tony Park</u> , attaching: 1) a media release for JHIL dated 14 February 2001 and a media release for the Foundation regarding the establishment of the Foundation; 2) Q&A for JHIL and the Foundation; and 3) a key messages document. In the documents forwarded by Ms Rotsey, were statements to the effect that the Foundation would have sufficient funds to meet all future Asbestos Claims and the words " <i>fully funded</i> " appeared. In the Foundation release there was the following: <i>"A new, fully-funded organisation, the Medical Research and Compensation Foundation (MRCF)</i>	JHAB.339.007.0098 JHAB.339.007.0099 JHAB.339.007.0102 JHAB.339.007.0103 JHAB.339.007.0108 JHAB.339.007.0109 Baxter (AFFL001.025.0001_M) at [89]	<u>ABBlu5/2006</u> <u>ABBlu5/2007</u> <u>ABBlu5/2010</u> <u>ABBlu5/2011</u> <u>ABBlu5/2016</u> <u>ABBlu5/2017</u> ABBlu10/4610Q	[103] - [107], ABRed2/427P-430K	[189] - [195], ABWhi/40.46-44.06

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		<p><i>has been established to handle asbestos-related claims against former James Hardie companies, and to fund medical research.</i></p> <p>In the JHIL Q & A material there was a statement:</p> <p><i>"We have established a fully-funded Medical Research and Compensation Foundation which provides much greater security than ever before for people with legitimate asbestos-related claims against James Hardie, and for James Hardie shareholders."</i></p> <p>The key messages document included the following:</p> <p><i>"As a fully-funded Foundation, the MRCF provides certainty for claimants injured by asbestos that there will be sufficient funds to meet all legitimate compensation claims."</i></p> <p>The JHIL release (7.28pm draft announcement) also contained such statements.</p>				
	14 February 2001	Baxter states that he forwarded the 7.28pm draft announcement to Maedonald, Shafron, Morley & others and had a discussion with Maedonald about the draft release.	Baxter (AFFI.001.025.0001_M) at [92]-[93]	ABBlu10/46111-M		
68.	15 February 2001 at 12.33am (14 February 2001 at 5.33am US	Harman sent an email to Gillfillan and Koffel attaching a February 2001 JHIL board presentation and excel spreadsheet. The material provided did not include a draft ASX announcement.	(JHAB.102.003.0030); Harman (EVID.001.001.0112_M) at [153]-[165]; (JHAB.065.003.0194); (JHAB.065.003.0195);	ABBlu5/2112 ABBlu11/4916P-4921Q ABBlu5/2113 ABBlu5/2114 ABBlu5/2115	[108], ABRed2/430L -Q [278] - [284], ABRed2/484W-486K	[168], ABWhi/37.13-19

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	West Coast time)		(JHAB.065.003.0196); (JHAB.065.003.0197); (JHAB.065.003.0198)	ABBlu5/2116 ABBlu5/2117		
69.	15 February 2001 at 6.57am	Baxter sent an email to Rotsey, copied to Ashe, entitled " <i>FW: revised material - draft only</i> ", returning the documents she had sent the previous evening with his amendments. Baxter did not make any amendments to the draft ASX announcement dated 14 February 2001. The email included the following: <i>"if possible, can you have these amended and back to Melissa by 10am so that she can bring me a fresh set to the Bd meeting. If not, can you let me know that before 9.30am please".</i>	<u>JHAB.339.007.0070</u> <u>JHAB.339.007.0071</u> <u>JHAB.339.007.0074</u> <u>JHAB.339.007.0076</u> <u>JHAB.339.007.0081</u> <u>JHAB.339.007.0082</u> JHAB.339.006.3528 JHAB.339.006.3529 JHAB.339.006.3532 JHAB.339.006.3534 JHAB.339.006.3539 JHAB.339.006.3540 Baxter (AFFI.001.025.0001_M) at [95]; Rotsey (EVID.001.001.0189_M) at [37]	<u>ABBlu5/2071</u> <u>ABBlu5/2072</u> <u>ABBlu5/2075</u> <u>ABBlu5/2077</u> <u>ABBlu5/2082</u> <u>ABBlu5/2083</u> ABBlu10/4611S ABBlu12/5324U	[109], ABRed2/430S-431E	[204], ABWhi/45.24-32
70.	15 February 2001 at 7.24am	Baxter sent an email to Rotsey attaching his revised changes to the draft ASX announcement for JHIL dated 14 February 2001 (Draft ASX Announcement). The email stated: <i>"here are my comments on the news release - no doubt we can refine further later today - this is the version I will take to the Bd meeting".</i> The attached revised draft announcement was in	JHAB.339.007.0025 JHAB.339.007.0026 Baxter (AFF.001.025.0001_M) at [94] Rotsey (EVID.001.001.0189_M) at [40] JHAB.339.007.0026	ABBlu5/2085 ABBlu5/2086 ABBlu10/4611M ABBlu12/5325S ABBlu5/2086	[110] - [111], ABRed2/431E-433M [219], ABRed2/466R-Y	[204], ABWhi/45.24-32

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		the same terms as the Draft ASX Announcement except that it contained boxes explaining Mr Baxter's deletions.				
71.	15 February 2001 at 8.05am	Email from Robb (Allens) to Shafron attaching revised draft minutes of JHIL board meeting for 15 February 2001.	(ALNS.005.055.0358); (ALNS.005.055.0359)	ABBlu5/2102 ABBlu5/2103		
72.	15 February 2001	Findings that the Draft ASX Announcement taken to the meeting of 15 February 2001 of JHIL board was the document annexed to Fourth Further Amended Statement of Claim.			[129], ABRed2/443K-O [193]-[194] ABRed2/460I- U [196], ABRed2/461F-N [197], ABRed2/461N-T [200]-[201], ABRed2/462M-463E [219] - [220], ABRed2/466R-467I	[203], ABWhi/45.17-23 [207], ABWhi/45.46-48 [789], ABWhi/146.26-32
73.	15 February 2001 from 9.00am to 12.50pm	JHIL board meeting attended by McGregor, Macdonald, Brown, Gillfillan (by telephone), Hellicar, Koffel (by telephone), O'Brien (as an alternate for Cushing), Terry, Willcox, Shafron, Morley and Baxter held at the offices of PwC. A series of slides entitled " <i>Project Green Board Presentation</i> " was presented. It contained 10 references to an announcement. Under that part of section 2 of the slide	(JHAB.056.035.0104) at 0104, 0111; Baxter (AFFI.001.025.0001_M) at [100]-[116]; Harman (EVID.001.001.0112_M) at [167]; (JHAB.016.005.0261) at	ABBlu5/2118 ABBlu5/2125 ABBlu10/4613L-4616Q ABBlu11/4921S	[90] - [93], ABRed2/423M-425K [126], ABRed2./442U-X [272] - [274], ABRed2/483G-X [276], ABRed2/484I-U	[169] - [178], ABWhi/37.20-39.34 [219], ABWhi/50.08-09 [220], ABWhi/50.10-15 [463], ABWhi/93.10-13 [466],

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		<p>presentation headed "<i>Update on Board paper</i>", a communications strategy was set out which stated, inter alia:</p> <ul style="list-style-type: none"> • "<i>Since we issued the Board paper, we have continued to investigate and analyse the key risks and fine tune our key messages and strategy</i> • <i>This analysis included further discussions with the communication advisors and new discussions with advisors brought on board in the past 10 days (see over)</i> • <i>As the details of the separation model have evolved, we and our advisors have become much more confident in our ability to "sell" the proposal to external stakeholders";</i> <p>Under the heading "<i>Key Messages</i>" the presentation provided:</p> <ul style="list-style-type: none"> • "<i>JH has effectively resolved its asbestos liability for the benefit of shareholders and claimants.</i> • ... • <i>The Foundation expects to have enough funds to pay all claims"</i> 	0284	ABBlue5/2220	[815] - [820], ABRed2/623I-625F	ABWhi/93.27-29
		<p>Under the heading "<i>Communication strategy</i>":</p> <p>"Overall approach</p>	(JHAB.016.005.0261) at 0291	ABBlu5/2227		

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		<ul style="list-style-type: none"> • <i>Attract as little attention as possible</i> • <i>Position as a business story</i> • <i>Win the support of shareholders and the investment community</i> • <i>Openly engage other stakeholders and address their concerns</i> • <i>Minimise the potential of government intervention</i> • <i>All media filtered by GB";</i> <p>The next 12 pages expanded upon this strategy and advised that an announcement would be made in conjunction with the third quarter results. This part of the slide presentation contained the following references to the fact that there would be an announcement:</p> <p><i>"Announce in conjunction with Q3 results" (at 0292)</i></p> <p><i>"Include separation of Q3 results, news release and MD & A, and provide detailed briefing notes as well as the news release on the Foundation itself." (at 0292)</i></p> <p><i>"Conduct post announcement survey or major institutions" (at 0292).</i></p> <p><i>"Provide Foundation's specific news release for both JH and the Foundation as well as detailed</i></p>				

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		<p><i>briefing notes.</i>" (0294)</p> <p><i>"Arrange meetings for the day of the announcement or first opportunity post announcement with...."</i> (0295)</p> <p><i>"Call and send information to the following government figures on the day of announcement and offer briefings..."</i> (0296)</p> <p><i>"On the day of the announcement, call and send information..."</i> (0297)</p> <p><i>"Email Foundation specific news release to all Australian staff..."</i> (0299)</p> <p><i>"Provide the news release, briefing notes and contact details..."</i> (0299)</p> <p><i>"Announcement of Foundation"</i> specifying the date as 16 February 2001 (the final slide of the presentation at 0317)</p> <p>The final two slides in this section addressed "Positives" and "Negatives", and concluded with the Recommendation: <i>"It is recommended the Board approve the establishment of the Foundation based on the matters outlined in the Board paper and this presentation."</i></p> <p>The minutes record that the board resolved, inter alia:</p> <p><i>"ASX Announcement</i></p> <p><i>The Chairman tabled an announcement to the ASX</i></p>				

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		<p><i>whereby the Company explains the effect of the resolutions passed at this meeting and the terms of the Foundation (ASX Announcement).</i></p> <p><i>Resolved that:</i></p> <p><i>(a) the Company approved the ASX Announcement; and</i></p> <p><i>(b) the ASX Announcement be executed by the Company and sent to the ASX."</i></p>				
74.	15 February 2001 at 9.35am	<p>Rotsey sent an email to Baxter, copied to Wheeler. The email stated: "<i>Please find revised material</i>". The revised was:</p> <ul style="list-style-type: none"> • JHIL Key Messages; • Foundation - draft Media Questions and Answers; • Foundation draft release; • JHIL - draft Media Questions and Answers, • JHIL draft Release. <p>The revised material included a further draft of the news release and was dated 15 February 2001 (9.35am Draft Announcement).</p> <p>It made an inaccurate alteration to the sixth paragraph of the Draft ASX Announcement and contained the remnant of one of Mr Baxter's boxes in relation to the 3rd paragraph containing the word "<i>Deleted</i>" but without Mr Baxter's</p>	<p>JHAB.339.007.0084 JHAB.339.007.0096 JHAB.339.007.0085 JHAB.339.007.0086 JHAB.339.007.0089 JHAB.339.007.0091 JHAB.339.007.0096 Wheeler (AFFI.001.022.0001_M) at [17] Rotsey (EVID.001.001.0189_M) at [41] Baxter (AFFI.001.025.0001_M) at [96]</p>	<p><u>ABBlu5/2126</u> ABBlu5/2127 ABBlu10/4527K ABBlu12/5326F ABBlu10/4612G.</p>	<p>[112], ABRed2/433O-435V</p>	<p>[211], ABWhi/47.11-19 [213], ABWhi/47.24-48.20</p>

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		explanation which had been " <i>s purpose is to</i> ".				
75.	15 February 2001 at 1.11pm	Wheeler sent an email to Ashe attaching a copy of the 9.35am Draft Announcement.	JHAB.T382.001.4403 JHAB.T382.001.4404	ABBlu5/2134 ABBlu5/2135	[113], ABRed2/435W-X	
76.	15 February 2001 at 2.47pm	A copy of the 9.35am Draft Announcement was faxed to Brett at PwC requesting confirmation of his consent to the use of PwC's name.	(JHAB.065.003.0269); (JHAB.065.003.0270); (JHAB.065.003.0272); Brett (AFFI.001.026.0001_M) at [54]	ABBlu5/2130-2133; ABBlu10/4521P	[114], ABRed2/436B	
77.	15 February 2001 at 3.40pm (14 February 2001 at 8.40pm US West Coast time)	Brett sent an email to Harman confirming his consent to the use of PwC's name.	(JHAB.065.003.0268) Brett (AFFI.001.026.0001_M) at [59]	ABBlu5/2129 ABBlu10/4523E		
78.	<u>15 February 2001 at 4.15pm</u>	<u>Wheeler sent an email to Baxter entitled "<i>FW: Please find revised material</i>", attaching the 9.35am Draft Announcement, the Foundation's press release entitled "<i>New Foundation to Compensate Asbestos Disease Sufferers</i>", Draft Media Question Answers (for JHIL and the Foundation) and JHIL's key messages.</u>	<u>JHAB.339.007.0042</u> <u>JHAB.339.007.0054</u>	<u>ABBlu5/2148</u> <u>ABBlu5/2160</u>		
79.	15 February 2001	DOCI executed.	(JHAB.016.005.0326); D Cameron (EVID.001.001.0031 M)	ABBlu6/2343 ABBlu12/5282N	[18], ABRed2/400M-S	

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			at [146]			
80.	15 February 2001 at 5.07pm	Shafron sent an email to Wheeler requesting a copy of the current draft of the announcement stating " <i>whatever you have now please - I what [sic] to get Trowbridge approval to cite them</i> ". The email was sent in response to an email from Wheeler sent 9 minutes earlier (at 4.58pm, being 9.59pm on 14 February 2001 US West Coast time) which stated: " <i>Peter, Melanie has passed on a message to me that you are after a soft copy of the Media Release for the Foundation. Greg is currently working on it so once final will send it through. Please let me know if this doesn't suit.</i> "	(JHAB.L006.020.1041) Wheeler (AFFI.001.022.0001_M) at [27]	ABBlu5/2161 ABBlu10/4528R		[337], ABWhi/70.01-23
81.	15 February 2001 at 7.42pm	Baxter sent an email to Wheeler attaching a further draft of the announcement to the ASX (7.42pm Draft Announcement).	JHAB.339.007.0001 JHAB.339.007.0002	ABBlu5/2166 ABBlu5/2167	[115], ABRed2/436G-438Q [121], ABRed2/439H-441Z	[215] - [218] ABWhi/48.27-50.03
82.	<u>15 February 2001</u>	<u>Robb and Cameron made handwritten annotations to the 7.24am version of the draft press release.</u> <u>LJ[219] states: "It is unnecessary to speculate on the timing of the handwriting on the two Draft ASX Announcements produced by Allens..."</u>	<u>ALNS.072.006.0062</u> <u>ALNS.084.005.0087</u>	<u>ABBlu5/2185</u> <u>ABBlu5/2187</u>	[197], ABRed2/461N-S [219], ABRed2/466R-V	[345], <u>ABWhi/71.35-38</u>
83.	<u>15 February 2001</u>	<u>Whilst working with Robb in his office on an amendment to the DOCI, Morley saw Robb write the word "anticipated" on a copy of the Draft ASX</u>	<u>DOC.03DEF.001.0001 at [534]</u>	<u>ABBlu12/5667D-J</u>	[218], ABRed2/466N-Q	[325], <u>ABWhi/68.42-45</u>

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		<u>Announcement.</u> <u>LJ[218] states: "Mr Morley was mistaken as to the timing of this event."</u>				
84.	15 February 2001 at 8.12pm	Shafron sent an email to Minty copied to Marshall, entitled " <u>Foundation Confidential</u> ", which included the following statement: <u>"The JHIL Board approved the deal this afternoon. Thanks for your help.</u> <u>The wording we propose in the press release simply says that James Hardie got advice from Trowbridge (and Access Economics, and PwC).</u> <u>As of the moment the document is not available for me to attach.</u> <u>I trust you are OK with that."</u>	JHAB.L006.036.0673	ABBlu5/1956G-I	[136], ABRed2/445R-V	[337], ABWhi/70.02-22
85.	15 February 2001 at 9.27pm	Wheeler sent an email to Melanie Coghlan attaching the 7.42pm Draft Announcement.	JHAB.339.007.0010 JHAB.339.007.0011	ABBlu5/2169 ABBlu5/2170	[118], ABRed2/439B-C	
86.	15 February 2001 at 10.03pm	Coghlan sent an email to Wheeler attaching various documents including the final ASX Announcement (Final ASX Announcement).	JHAB.T339.008.0027 JHAB.T339.008.0076	ABBlu5/2172 ABBlu5/2173	[119], ABRed2/439D-F [121], ABRed2/439H-441Y	
87.	16 February 2001 at 10.19am	Final ASX Announcement sent to the ASX by <u>D Cameron</u> and issued. JHIL Third Quarter results announced.	ASX.001.001.0022 ASX.001.001.0023 ASX.001.001.0032 ASE 001.001.0001 Ross	ABBlu6/2386 ABBlu6/2387 ABBlu6/2396	[120], ABRed2/439F-H	

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			(AFFI.001.016.0001_M) at [22]; Baxter (AFFI.001.025.0001_M) at [126]	ABB <u>lu</u> 10/4666R-4667T ABB <u>lu</u> 10/4618E		
88.	16 February 2001 at 11.00am	Macdonald appeared at a press conference and gave a presentation regarding the creation of the Foundation and JHIL's Third Quarter results.	Baxter (AFFI.001.025.0001_M) at [129]-[130]	ABB <u>lu</u> 10/4618Q-T	[22], ABRed2/401T-402E	
89.	16 February 2001 at around 2pm	<u>Shafron asked Morley the question "who approved the press release?"</u> <u>Morley responded saying "I assume Macdonald approved it".</u>	DOC.03DEF.001.0001 at [537]	ABB <u>lu</u> 12/5667T-W		[337], <u>ABWhi/70.20</u>
90.	16 February 2001	Email sent by Wheeler to the directors of JHIL with Weblinks to the Final ASX Announcement.	Wheeler (AFFI.001.022.0001_M) at [32] (This paragraph of the affidavit is subject to a limited use ruling)	ABB <u>lu</u> 10/4529Q	[1165], ABRed2/715Q-S [1185], ABRed2/719I-O	
91.	Prior to 20 February 2001	Stevenson sent a facsimile to Brown and Willcox regarding a teleconference on 20 February 2001 which provided: <i>"At the last meeting it was agreed that there would be a telephone conference set up for Tuesday morning, Australian time, so that interested directors could hear a report on the aftermath of the separation announcement. Accordingly a call has been arranged as follows: Australian time: Tuesday 9 am....Freecall numbers are: Australia</i>	JHAB.E001.001.0056	<u>ABB<u>lu</u>6/2497</u>	[1166], ABRed2/715S-Y	[513], ABWhi/100.49-101.04

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		1800505427..."				
92.	20 February 2001	<p>Teleconference held for directors. Telephone records of Hellicar, admitted only against her, record her telephoning Stevenson's number just prior to 9am on Tuesday, 20 February 2001 and then calling the free call number three times at around 9am on that day. The combination of Stevenson's facsimile, the entries in the diaries of Brown and Hellicar and, as against her, the telephone records establish that. The time she was on the telephone is consistent with that.</p> <p><u>Australian Securities and Investments Commission v Macdonald (No 5) [2008] NSWSC 1169 at [12]:</u></p> <p><i>"Again, that says nothing about board consideration of the terms of any announcement to the ASX and while it does record an agreement to hold a teleconference to discuss the aftermath of the separation announcement, that should not be restricted to the ASX announcement."</i></p> <p><u>Australian Securities and Investments Commission v Macdonald (No 6) [2008] NSWSC 1175 at [10]:</u></p> <p><i>"Further, in my view, any agreement to hold a teleconference is not tied in to any discussion at the board meeting of 15 February 2001 to the terms of any ASX announcement."</i></p>	<p>(JHAB.E001.001.0056) (DOC.06DEF.001.0153) (MISC.015.001.001) (use limited under the Evidence Act s136 to case against Hellicar) T2051/24-37 T2080/35-39 (Brown)</p>	<p>ABBlu6/2497 ABBlu6/2496 ABBlu6/2506 ABBla3/1332M-S ABBla3/1361R-T</p>	<p>[1170], ABRed2/716P-R [1173], ABRed2/717B-J [1178], ABRed2/717W-718D <u>ABRed1/383N</u> <u>ABRed1/391V</u></p>	
93.	23 February 2001	<p>JHIL made an ASX announcement entitled "<i>James Hardie welcomes dialogue</i>".</p>	<p>JHAB.339.006.2068 Ross (AFFI.001.016.0001_M)</p>	<p><u>ABBlu6/2511</u> ABBlu10/4668I</p>	<p>[682]-[683], ABRed2/588B-589L</p>	<p>[446] - [449], ABWhi/90.41-91.15</p>

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			at [24(a)]			
94.	24 February 2001	Macdonald sent an email to Gillfillan, Hellicar and Koffel and others attaching the 23 February ASX announcement, which included the statement "FYI" and advised: <i>"In response to recent and anticipated media articles.</i> <i>"Susan - could you please fax a copy to Peter Willcox and forward a copy to Michael Brown's new email address"</i>	JHAB.213.002.0040 JHAB.213.002.0041	<u>ABBlu6/2512</u> <u>ABBlu6/2513</u>	[1185], ABRed2/719I-O	[446], ABWhi/90.41-45
95.	21 March 2001	Shafron sent an email to Macdonald copied to Morley attaching a further draft of the minutes of the JHIL board meeting held on 15 February 2001.	(JHAB.T937.001.1250); (JHAB.T937.001.1251)	ABBlu6/2671 ABBlu6/2672		[479], ABWhi/94.45-51
96.	21 March 2001	JHIL made an ASX announcement entitled " <i>James Hardie Industry Limited Foundation safeguards rights</i> ".	ASE.003.001.0159 Ross (AFFL.001.016.0001_M) at [24(b)]	<u>ABBlu6/2683</u> ABBlu10/4668J	[712], ABRed2/595H-596V	[455] - [457], ABWhi/92.15-32
97.	29 March 2001	Robb sent a letter to Morley enclosing an account issued by Allens to JHIL for work undertaken during the period 5 February to 27 March 2001. The letter stated that the work included " <i>settling various completion documents and board minutes as required by Alan Kneeshaw for JHIL</i> ".	(JHAB.063.004.0128)	ABBlu7/2826		[481]; ABWhi/95.07-11
98.	30 March 2001	Shafron sent an email to Robb attaching draft of the minutes from the 15 February 2001 Meeting noting that " <i>they have not been confirmed by the board yet</i> ".	ALNS.005.053.0321 ALNS.005.053.0322	<u>ABBlu7/2830</u> <u>ABBlu7/2831</u>		[480], ABWhi/95.01-04

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99.	Prior to 3 April 2001	The board papers for the April 2001 board meeting were sent to the directors, including the draft minutes of the 15 February 2001 Meeting.	JHAB.112.002.0009 JHAB.112.002.0047	<u>ABBlu6/2542</u> <u>ABBlu6/2580</u>	[1193], ABRed2/720T-721D	[482] ABWhi/95.12-14
100.	3 April 2001	O'Brien appointed a director of JHIL (having previously been alternate to Sir Selwyn Cushing).	(COMM.020.006.0076) at 0079	ABBlu9/4135R		
101.	3/4 April 2001	JHIL board meeting attended by McGregor, Macdonald, Hellicar, Brown, Gillfillan, Koffel, Terry, O'Brien, Morley and Shafron. At the meeting the Draft minutes of the 15 February 2001 meeting were approved by all of the directors with the exception of Willcox who was absent. None of them raised any concern with the resolution approving the Draft ASX Announcement. The draft minutes had been included in the April 2001 board packs sent to each of the directors of JHIL. The board papers for the meeting included: <ul style="list-style-type: none"> the draft minutes of the JHIL board meeting held on 15 February 2001; a paper headed "<i>Restructure</i>" which reported that reaction "<i>to the establishment of the Foundation has been generally in accordance with the views expressed in the Communications Strategy document provided in the Board for its February meeting</i>". The minutes of the 3/4 April meeting record the confirmation of the minutes of the 15 February 2001 meeting which recorded that the board resolved, amongst other things, to approve the	(JHAB.112.002.0010) Baxter (AFFI.001.025.0001_M) at [145] D. Cameron (EVID.001.001.0031_M) at [15], [177] Brown (DOC.04DEF.001.0001_M) at [15], [227], T1823/4 Gillfillan (DOC.05DEF.001.0039_M) at [117], T2413/19 Hellicar (DOC.06DEF.001.0156) at [180], T3093/27 Koffel (DOC.07DEF.001.0001) at [105]; Willcox (DOC.10DEF.001.0001) at [128] (JHAB.112.002.0112) (JHAB.056.035.0101);	ABBlu6/2543 ABBlu10/4621N ABBlu12/5232N, 5292F ABBlu13/5695H, 5760D, ABBla3/1107 ABBlu13/5819J ABBla4/1676 ABBlu13/5885I ABBla5/2321 ABBlu13/5941T ABBlu12/5558S ABBlu6/2645 ABBlu7/2839 ABBlu6/2580	[53], ABRed2/412J-R [1192]- [1193], ABRed2/720P-721D	[483], ABWhi/95.16-18 [486], ABWhi/96.29-33 [497], ABWhi/98.38-42

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		<p>Draft ASX Announcement and its release to the ASX. The minutes of the board of JHIL of 15 February 2001 Meeting were signed as a correct record by the chairman, Mr McGregor at the meeting. They contained the following entry:</p> <p><i>"ASX Announcement</i></p> <p><i>The Chairman tabled an announcement to the ASX whereby the Company explains the effect of the resolutions passed at this meeting and the terms of the Foundation (ASX Announcement).</i></p> <p><i>Resolved that:</i></p> <p><i>(a) the Company approve the ASX Announcement; and</i></p> <p><i>(b) the ASX Announcement be executed by the Company and sent to ASX."</i></p>	(JHAB.112.002.0047)			
102.	28 May 2001	Terry resigned as a director of JHIL.	(COMM.020.006.0076) at 0079	ABBlu9/4135Q		
103.	28 May 2001	O'Brien resigned as a director of JHIL	(COMM.020.006.0076) at 0079	ABBlu9/4135S		
104.	19 July 2002	Koffel resigned as director of James Hardie Industries NV (JHINV).	(DOC.07DEF.001.0001_M) at [136]	ABBlu13/5753L		
105.	14 August 2001	Macdonald appointed a director and employed as CEO of JHINV.	(MISC.007.001.0001)			
106.	7 September 2001	McGregor appointed a director and chairman of the board of JHINV.	(MISC.007.001.0001); (MCGR.002.001.0049); SCOI statement of	ABBlu9/4200H		

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			McGregor (JHAB.110.001.0003) at [1]			
107.	7 September 2001	Gillfillan appointed a director of JHINV.	(MISC.007.001.0001)			
108.	19 October 2001	Willcox resigned as a director of JHIL.	DOC.10DEF.001.0001	ABBlu12/5497Q		
109.	19 October 2001	Brown appointed a director of JHINV.	(MISC.007.001.0001)			
110.	19 October 2001	Hellicar appointed a director of JHINV.	(MISC.007.001.0001)			
111.	19 October 2001	Koffel appointed a director of JHINV.	(MISC.007.001.0001)			
112.	25 February 2004	Media Release by James Hardie titled " <i>Special Commission into MRCF</i> " and attached background information titled " <i>James Hardie and the MRCF</i> " which provided " <i>Does James Hardie believe the Foundation was provided with enough money 'to deal' with asbestos related claims? If so, why is it now running out of money. Yes. The JHIL Board at the time set aside around \$300 million, which is what experts said at the time was needed to provide certainty to future claimants.</i> "	(JHAB.096.006.0357); (JHAB.096.006.0359); Baxter (AFFI.001.025.0001_M) at [195]	ABBlu9/4129 <u>ABBlu9/4124</u> ABBlu10/4629J		
113.	26 February 2004	Email from Hellicar to Macdonald and Baxter in relation to media release of previous evening: " <i>I thought your release last night was excellent. I've only seen AFR and SMH this morning and,</i>	(MCGR.002.001.0223)	ABBlu9/4131		

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		<i>considering what might have been the treatment of us, it was good to see the SMH in particular addressing some of our arguments."</i>				
114.	27 February 2004	Special Commission of Inquiry into the Medical Research and Compensation Foundation (SCOI) commissioned by Letters Patent and the NSW Government announces appointment of the Honourable David Jackson AM QC.			[181], ABRed2/456V-457I	
115.	24 May 2004	Hellicar met with Macdonald prior to meeting of JHINV board. She received a copy of a memorandum he was to give to the directors. Item 6 was as follows: <i>"That the executives of JHIL misled investors, government and the broader community by falsely promoting the ability of the MRCF to meet future claimants' costs".</i> Ms Hellicar placed an arrow next to that item.			[1241], ABRed2/730T-731E	
116.	29 July 2004	Emails from Stuart Lawrence of Allens to, among others, Hellicar, Morley and Shafron attaching redacted draft and final submissions in reply prepared on behalf of JHINV to JHINV to SCOI on Terms of Reference 1 to 3. This provided among other things: <i>"Generally: The terms of the media release (described in the minutes as the ASX Announcement) were considered and the subject of a resolution at the JHIL Board meeting on 15 February..... The minutes indicate that the Board was satisfied after</i>	(JHAB.T936.012.3857); (JHAB.T936.012.3858); (JHAB.T936.012.3868) at 3919, 3920 and 3923; (JHAB.T936.014.0560) (JHAB.T936.014.0562) at 0612, 0613 and 0616 (COMM.028.005.001) at 0052, 0052 and 0056. (Admitted against Morley only subject to limited use under s.136 Evidence			[535]–[541]; ABWhi/103.39-104.42

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		<i>discussion that there was likely to be a surplus of funds in the Foundation taking into account available assets, likely earnings rates and likely future claims and costs...."</i>	<i>Act to Morley</i>) (T1780.2)			
			Rejected (<i>Australian Securities and Investment Commission v Macdonald (No 3)</i> [2008] NSWSC 1099 at [37]-[38]. Subject of ASIC's Notices of Contention in appeal proceedings of	ABRed1/367N-Q		
117.	11 August 2004	Hellicar recipient of email of 11 August 2004.	<u>JHAB.T936.001.2798</u>		[1242], ABRed2/731E-K	
118.	12 August 2004	Atanaskovic Hartnell engaged as solicitors for JHINV.	JHAB.120.001.0071 JHAB.120.001.0074	<u>ABBlu10/4281</u> <u>ABBlu10/4282</u>		
119.	21 September 2004	SCOI report released.				[543], ABWhi/104.49-105.05
120.	21 September 2004	Email from Atanaskovic Hartnell to, amongst others, Brown, Gillfillan and Hellicar attaching summary of SCOI report.	<u>JHAB.120.001.0186_R</u> <u>JHAB.120.001.0220_R</u> (admitted against <u>Shafron, Brown, Gillfillan and Hellicar</u>)	<u>ABBlu10/4337</u> <u>ABBlu10/4338</u>		[543] - [546], ABWhi/104.49-105.21
121.	September 2004	JHINV supervisory board receives advice from Dutch lawyers that JHINV directors were required to disclose conflicts of interest in relation to matters the subject of investigation by SCOI. A			[1221], ABRed2/726B-K	[547], ABWhi/105.22-29

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		draft declaration was prepared by JHINV's solicitors.				
122.	23-28 September 2004	A meeting of the JHINV supervisory board was held. Minutes of meeting record <i>"that each of Ms Hellicar, and Messrs Brown, Cameron, Clark, Gillfillan and Loudon had given disclosure notices in relation to interests and that the terms of such notices have been provided by email or fax to each other director in each case"</i> .	JHAB.072.001.0062 (Use limited under section 136 of the <i>Evidence Act 1995</i>) (admitted against Hellicar, Brown, Gillfillan, Shafron, Koffel and Willcox).	ABRed2/726C ABBlu10/4351	[1221], ABRed2/726B-K	[547], ABWhi/105.22-29
123.	25 September 2004	Email sent by Hellicar to, amongst others, Brown and Gillfillan, stating <i>"attached is my declaration which I will sign and provide to whomever John [Atanasokic] advises"</i> .	(BARJ.001.001.0039) at 0041	ABBlu10/4345	[1221] - [1222], ABRed2/726B-O	[548], ABWhi/105.30-33
124.	25 September 2004	Hellicar and Gillfillan provided declarations of interest addressed to the other directors of JHINV in following terms: <i>"I participated in the deliberations leading to the decision taken by the Board of Directors of JHIL on 15 February 2001, and in the decision itself, to approve the terms of the press release made by JHIL to the Australian Stock Exchange on that day announcing the establishment of the Foundation"</i>	(JHAB.273.001.0005) (Use limited under s.136 <i>Evidence Act</i> to Hellicar) T2853/21 to 45 (DOC.05DEF.001.0020) (use limited under s.136 <i>Evidence Act</i> to Gillfillan) T2335/4 to 2336/40	ABBlu10/4347 ABRed2/726C-727N ABBla5/2087K-W ABBla4/1601D to 1602T	[1221] - [1227], ABRed2/726B-727O	[549] - [552] ABWhi/105.35-106.16
125.	26 September 2004	Brown executed declaration of interest addressed to the other directors of JHINV, which included a statement that he had participated in a decision to approve the terms of the press release made by	(JHAB.273.001.0001) (Use limited under s.136 <i>Evidence Act</i> to Brown) T2173/10 to 2175/7	ABBlu10/4347 ABBla1451F-1453X	[1224] - [1227], ABRed2/726U-727O	[552], ABWhi/106.15-16 [554] - [562], ABWhi/106.22-

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		JHIL in relevantly identical terms to the declarations of Hellicar and Gillfillan.				107.37
126.	28 September 2004	Minutes of meeting of JHINV record that the members of the board noted that Brown, Gillfillan and Hellicar and some others <i>"had given disclosure notices in relation to interests and that the terms of such notices had been provided by email or fax to each other director in each case"</i> .	(JHAB.072.001.0062) (admitted against <u>Shafron, Brown, Gillfillan, Hellicar, Koffel and Willcox</u>).	ABBlu10/4351		[553], ABWhi/106.17-21
127.	Early 2005	Benjamin Butterfield advises Hellicar that directors of JHINV were required under Dutch law to lodge with the company a further standing disclosure notice.			[1228] - [1231], ABRed2/7270-728Y	
128.	16 May 2005	JHINV board meeting held. A draft revised declaration of Hellicar, Brown and Gillfillan was circulated at the board meeting. The draft revised declaration raised the issue of a potential inaccuracy in the minutes of the 15/2/01 Meeting. The revised declaration made reference to a letter to be sent by Hellicar, Brown and Gillfillan to the supervisory board of JHINV, which also included a statement that the directors had no positive recollection of the approval of the ASX announcement which was recorded in the minutes of the 15/2/01 Meeting.	DOC.05DEF.001.0023 DOC.05DEF.001.0027 (admitted against <u>Macdonald, Shafron, Brown, Gillfillan, Hellicar and Koffel</u>) DOC.05DEF.001.0031 (use limited under s.136 <u>Evidence Act to Hellicar</u>)	ABBlu10/4278 ABBlu10/4365 ABBlu10/4358	[1230]-[1231], ABRed2/728D-Y	[593] - [595], ABWhi/112.36-49
129.	21 November 2006	Amended and Restated Final Funding Agreement executed by JHINV, James Hardie 117 Pty Limited, the NSW Government and Asbestos Injuries Compensation Fund Limited.	(DOC.08DEF.001.0297)			

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130.	14 February 2007	Commencement of proceedings by ASIC against Macdonald & Ors in Supreme Court of New South Wales, proceedings 1490 of 2007.				
131.	3 March 2008	ASIC commenced serving affidavits, outlines of evidence and list of topics. The material served on 3 March 2008 included a list of topics identifying documents for Wilson of UBS.				
132.	7 March 2008	ASIC served lists of topics identifying documents for all potential Allens witnesses including Robb.	(DOC.08DEF.001.0100)	ABBlu10/4662	[205], <u>ABRed2/463R-V</u>	[649], ABWhi/122.28-29
133.	7, 14 March 2008	ASIC served lists of topics for witnesses in accordance with the procedural directions for each of Robb, Sweetman and Wilson.	DOC.08DEF.001.0100 DOC.08DEF.001.0104	ABRed2/463R-T	[205], ABRed2/463R-V	[675], ABWhi/126.06-09
134.	14 March 2008	ASIC served list of topics for Sweetman of UBS.	(DOC.08DEF.001.0104)	ABBlu11/4759		[675], <u>ABWhi/126.06-09</u>
135.	2 September 2008	ASIC served the affidavit of Sweetman sworn 1 September 2008 intended to replace the list of topics served 14 March 2008 and advised the parties that it would seek leave to rely upon at the hearing.	DOC.08.DEF.001.0098	ABRed2/463R-T <u>ABBlu11/5078</u>	[205], ABRed2/463R-V	
136.	8 September 2008	ASIC advised by Allens of the relaxation by JHINV and ABN60 of a duty of confidentiality said to be owed to them by the Allens witnesses.	(DOC.08.DEF.001.0102)	ABBlu12/5224		
137.	9 September 2008	ASIC wrote to the parties advising that it proposed to attempt to obtain affidavits or outlines of evidence for each of the Allens witnesses for whom lists of topics had previously been served, including Robb.	DOC.08.DEF.001.0102	<u>ABBlu12/5224</u>		[651], ABWhi/122.32-44

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138.	15 September 2008	ASIC wrote to the parties advising that it intended to serve an affidavit of Robb (amongst others) and the preparation of it was " <i>underway</i> " and that an affidavit would be provided to the defendants " <i>at the earliest opportunity</i> ".	DOC.08DEF.001.0096	ABRed2/463R-T	ABRed2/463R-T	
139.	15 September 2008	Atanaskovic Hartnell (solicitors for the 4th-7th defendants) stated in a letter to ASIC that: <i>'in order to minimise the prejudice to the defendants to the proceedings, ASIC will give priority to the preparation and service of statements to those of the Allens witnesses who it asserted are 'major' witnesses'.</i>	DOC.08DEF.001.0090			
140.	16 September 2008	ASIC wrote to the Court advising that it intended to call a number of Allens witnesses, including Robb, and was in the process of attempting to obtain affidavits or outlines of evidence from them as soon as practicable to do so.	DOC.08DEF.001.0092	ABBlu12/5226	[205], ABRed2/463R-V	[652], ABWhi/122.45-51
141.	22 September 2008	ASIC informed the Court that they had " <i>exemplary cooperation from the Allen's [sic] witnesss and in endeavouring to provide these statements as soon as possible</i> ". The Court directed ASIC at a directions hearing to use its best endeavours to serve on the second and ninth defendants affidavits of Robb, Williams and other Allens solicitors by no later than 10.15am on 29 September 2008.	[T:25] at 46 - [T:26] at 2 [T:25] at 29 [T:25] at 32	ABBl1/2W-3C ABBl1/2O-Q		[653], ABWhi/123.01-10
142.	29 September 2008	The trial commenced.				[654], ABWhi/123.11-12

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143.	6 October 2008	ASIC wrote to the parties advising that it would not be reading the affidavits of Sweetman and Mackay (previously served) and that it would not be calling Wilson as a witness.	DOC.08DEF.001.0094	ABRed2/463R-F <u>ABBlu12/5306</u>	[205], ABRed2/463R-V	
144.	7 October 2008	Robb's solicitors wrote a letter to ASIC enclosing progress to date on part 1 of Robb's draft statement/affidavit/outline of evidence and which stated that they anticipated providing the draft of part 2 " <i>later this week</i> ".	DOC.08.DEF.001.0296	<u>ABBlu12/5308</u>		[656], ABWhi/123.22-26
145.	8 October 2008	ASIC informed the Court that it was considering whether or not to call Robb and other Allens witnesses and sought the opportunity to make a decision by the close of business that day.	[T:526] at 7 - [T:526] at 29	<u>ABBla1/218E-O</u>		[657], ABWhi/123.27-37
146.	9 October 2008	ASIC wrote to the parties advising that it would not be serving a statement or affidavit for Robb, Blanchard or Frangeskides, nor calling any of those people to give evidence in its case in chief and that it would be standing over subpoenas so that: "1. <i>if any defendant wishes to call any of these witnesses, our client is happy to facilitate their attendance via the subpoena issued at its request; and</i> 2. <i>if any defendant makes a case which requires any of these witnesses to be called in reply, our client will be able to call on the subpoenas.</i> "	DOC08.DEF.001.0293	ABRed2/463N-Q <u>ABBlu12/5309</u>	[205], ABRed2/463R-V	[661], ABWhi/124.20-30
147.	21 October	ASIC consented to all defendants having access to	T998.1 to 8	ABBla2/476B-F		

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	2008	draft of first part of Robb's statement.				
148.	22 October 2008	Robb's solicitors, HWL Ebsworth, wrote a letter to the eighth and ninth defendants. The letter stated: <i>"Since ASIC informed the Court that it was considering whether it would call any of the Allens witnesses in chief, Mr Robb has been approached by a number of different interests in the litigation requesting a meeting.</i> <i>We have instructed that Mr Robb is not prepared to meet with you or those other parties at this time."</i>	DOC.08DEF.001.0285 DOC.08DEF.001.0295	<u>ABBlu12/5409</u> <u>ABBlu12/5411</u>		[665], ABWhi/125.01-08
149.	23 April 2009	<i>Australian Securities and Investment Commission v Macdonald & Ors (No 11) [2009] NSW SC 287 (2009) 256 ALR 199: liability judgment.</i>		ABRed2/394	<u>ABRed2/394</u>	
150.	20 August 2009	<i>Australian Securities and Investment Commission v Macdonald & Ors (No 12) [2009] NSW SC 711 (2009) 259 ALR 116 penalty & costs judgment.</i>		ABRed3/571	<u>ABRed3/571</u>	
151.	27 August 2009	Orders made by the Court.		ABRed3/902	<u>ABRed3/902</u>	
152.	<u>17 December 2010</u>	<u><i>Morley v Australian Securities and Investments Commission (2010) 274 ALR 205: Court of Appeal's decision on liability.</i></u>				<u>ABWhi/1</u>
153.	<u>6 May 2011</u>	<u><i>Morley v Australian Securities and Investments Commission [2011] NSWCA 110: Court of Appeal's decision concerning the balance of Shafron's appeal and ASIC's cross-appeal in relation to Shafron.</i></u>				<u>ABWhi/228</u>

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