ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S175 of 2011

BETWEEN

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

and

GREGORY JAMES TERRY
Respondent

HIGH COURT OF AUSTRALIA
FILED
12 AUG 2011
THE REGISTRY SYDNEY

APPELLANT'S SUBMISSIONS IN REPLY

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

Introduction and Court of Appeal's reasoning (TS[14]-[19])

2. Mr Terry's submissions (**TS**) at [14]-[19] contend that in the Court of Appeal's reasoning the breach of the obligation of fairness "*was [only] a matter that* ***reinforced****, rather than was the sole basis of, the Court's finding that ASIC failed to establish the critical factual issues to the relevant standard*" (emphasis in original), and that in finding ASIC had failed to establish the critical factual issue to the relevant standard, the Court had regard to the "*basic principle*" derived from *Blatch v Archer* (1774) 98 ER 969, *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559.[1] On the contrary, the judgment did not contain a separate strand of *Blatch v Archer* or *Briginshaw* reasoning. The Court concluded that ASIC owed an obligation of fairness which required it to call a witness, and then applied s 140 of the *Evidence Act 1995* (NSW) and the principles said to be derived from *Blatch v Archer*, *Briginshaw* or *Whitlam* in determining the consequences of the failure to comply with that obligation.

3. First, this is evident from the structure of the judgment. Section 4.6.3 is headed "*Obligation to act fairly*", and extends from CA[701]-[777] ABWhi/130.9-144.28, which includes the discussion of s 140 of the *Evidence Act*, *Blatch v Archer* (CA[730] ABWhi/136.26) and *Whitlam* (CA[734], [752]-[753] ABWhi/137.3, 140.23-29). At CA[701]-[728] ABWhi/130.10-136.17, the Court of Appeal addresses what it describes as part of the "*first question*", namely whether "*failure to call a witness [can] constitute breach of the obligation of fairness*", which it answers affirmatively (CA[728] ABWhi/136.17). It then poses what it describes as the second question, namely "*the consequences of breach of the obligation*" (CA[729] ABWhi/136.23), and addresses the answer to that question from CA[730]-[756] ABWhi/136.26-141.13. It is in this part of its reasons that the Court of Appeal considers *Blatch v Archer* principle, but the starting point

[1] Mr Terry adopts the submissions of Ms Hellicar and Messrs Brown, Gillfillan and Koffel (**Hellicar respondents**) and the other respondents to ASIC's appeals in relation to those principles: TS[19]. These are addressed at [2]-[13] of ASIC's reply to the Hellicar respondents' submissions.

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is the partial answer to the first question concerning the "*obligation of fairness*". At CA[757] ABWhi/141.16 the Court then poses the remainder of the first question, namely "*whether there was a breach of the obligation in the circumstances of this case*", which it addresses at CA[758]-[777] ABWhi/141.18-144.28. The critical conclusions are at CA[775]-[777] ABWhi/144.4-28, which concern the cogency of ASIC's case in the context of a failure to comply with the obligation of fairness.

4. Second, this is evident from CA[760] ABWhi/141.37 where the Court summarises the combined effect of its partial answer to the first question and its answer to the second question: "*In the context of assessing the cogency of the case of a party subject to an obligation of fairness, the strength of the probability that a person has relevant evidence informs the expectation that that party will call the person as a witness*".

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5. Third, the conclusion is confirmed by the disagreement amongst the members of the Court of Appeal as to whether the obligation of fairness extended to requiring ASIC to call Messrs Wilson and Sweetman from UBS. Spigelman CJ and Beazley JA concluded that "*the duty of fairness was not triggered*" in relation to those witnesses, whereas Giles JA considered that it was (CA[770] ABWhi/143.18). A reading of CA[775] ABWhi/144.4 onwards reveals that Spigelman CJ and Beazley JA did not then proceed to consider in accordance with "*orthodox principle*" the consequences for ASIC of the failure to call them. For their Honours, the sole question was whether the obligation of fairness required that those witnesses be called. Once they concluded that it did not, Messrs Wilson and Sweetman did not further feature in their analysis.

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6. The only submission made against this by Mr Terry is where he points to part of CA[795] ABWhi/147.26: "*Failure of a party with the onus of proof to call an available and important witness, the more so if the failure is in breach of the obligations of fairness, counts against satisfaction on the balance of probabilities.*" However that comment needs to be considered together with the opening sentence to CA[795] ABWhi/147.26, namely: "*The significance of "should" rather than "could"* <u>*in the preceding paragraph*</u> *takes matters beyond Jones v Dunkel, and beyond what was said in, for example, Shalhoub*" (emphasis added).[2] This makes it clear that the Court of Appeal only considered the case as counting against satisfaction on the balance of probabilities because of the discussion in the preceding paragraph (CA[794] ABWhi/147.15) (which concluded that ASIC "*should*" have called him). CA[794] ABWhi/147.15 concluded that ASIC should have called Mr Robb "*[a]s a matter of fairness*" and in light of "*our more detailed discussion*" of the obligation of fairness. There is no separate discussion of whether ASIC "*should*" have called Mr Robb, otherwise than by reason of the "*obligation of fairness*".

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"*Key messages*" (TS[20]-[45])

7. Mr Terry submits that the most reliable guide to what the board was told at the meeting is contained in the slide presentation made to the board and the questions and answers contained in the board papers and that it is improbable that the board would have approved a press release which provided assurances of certainty which were at odds with those documents. ASIC replies as follows.

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8. First, as the trial judge noted, Mr Brown's affidavit evidence was that in response to his question to Mr Macdonald during the February 2001 meeting as to the sufficiency of the

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[2] The next sentence reads: "*The failure to call Mr Robb means more than disinclination to draw inferences favourable to ASIC's case*" CA[795] ABWhi/147.26.

funds allocated to the MRCF, Mr Macdonald said: "*If we can't tell all of the interested shareholders that there will be enough funds then we will have great difficulty getting acceptance of the plan and it won't work*" (emphasis added). Mr Macdonald later added: "*We are providing enough funds for future claims*".[3] Mr Brown's evidence of that exchange in cross-examination was: "*... I said, 'Are you sure there's enough money there?' and Peter came back and said to me, 'We have to be able to make that statement.' And I said to him, 'Peter, I appreciate you have to make that statement, but that's not the question I asked you'*" (emphasis added).[4] The trial judge also noted Mr Brown's evidence that no one at the meeting said anything to qualify what Mr Macdonald had said.[5]

10 9. As the trial judge noted, Mr Brown accepted that the statement to which Mr Macdonald was referring was a statement about the content of the announcement to the ASX.[6] Mr Brown said that: "*... my question to Mr Macdonald was in the context of the Trowbridge best estimate being a proper basis for a statement that we are sure that there are sufficient funds in the Foundation*"[7] (emphasis added).

10. The trial judge was entitled to accept and did accept that uncontradicted evidence of Mr Brown (LJ[149] ABRed2/449D). The effect of that evidence was that, without opposition, management made it perfectly clear to those present at the meeting, including Allens, that the establishment of the MRCF would be accompanied by a public statement that there "*will*" be sufficient funds for future claimants, and that the company was "*sure*" about the
20 sufficiency of funds, and that the establishment of the MRCF could not proceed unless such a statement was in fact made. The effect of the evidence of Mr Brown is that he appreciated such a statement had to, and would be, made. Further, it is implicit in the exchange reported by Mr Brown that, prior to the exchange, management had already conveyed to those present at the meeting that such a public statement would be made.[8] The Court of Appeal's reasons fail to address the import of Mr Macdonald's words at the meeting as to what the board was told about the public statement, and fail to address Mr Brown's acceptance that Mr Macdonald was referring to a public statement when he made those remarks (see CA[393]-[395] ABWhi/81.1-43). Those matters did not escape the attention of the trial judge (LJ[149] ABRed2/449B).

30 11. Second, the trial judge found that Mr Brown was dissatisfied with the communications strategy in the board papers for the February 2001 meeting, which included suggested questions and answers, because it did not convey that there would be certainty of funding (LJ[144] ABRed2/447P). His Honour cited Mr Brown's evidence to that effect along with his evidence that he expected after the January board meeting that if management was going to put another proposal, it would be fully funded, and that was the message they would be conveying to the market.[9] That finding was not disturbed by the Court of Appeal, and accorded with Mr Brown's cited evidence as well as other evidence.[10] Mr Brown had expressed concerns as to the lack of comfort as to sufficiency of funding indicated in the

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[3] LJ[148]-[150] ABRed2/448U-449I; Brown statement at [195] ABBlu13/5747I.
[4] T1907/44-1908/2 ABBla3/1191W-1192C.
[5] LJ[151] ABRed2/449J; Brown statement at [196] ABBlu13/5748G.
[6] LJ[149] ABRed2/449D; T2046/13-22 ABBla3/1328H-L.
[7] T2043/43-47 ABBla3/1325V-X.
[8] T2045/10-13 ABBla3/1327G-H.
[9] LJ[144] ABRed2/447Q-448G; Mr Brown's cited evidence is at T2042/1-23 ABBla3/1324B-M.
[10] CA[389] ABWhi/80.02; T2061/34-2062/29 ABBla3/1342R-1343P; T2024/32-2025/6 ABBla3/1306Q-1307E; T2026/1-44 ABBla3/1308B-W; T2048/22-27 ABBla3/1330L-O.

proposed question and answers and draft ASX release provided with the January board papers.[11]

12. Third, as the trial judge noted, Mr Brown's evidence was that there was significant discussion at the meeting about the terms of what would be communicated to the market on the announcement of the MRCF by means which included an ASX announcement.[12]

13. Fourth, as the trial judge noted, Mr Brown was satisfied that what was said about the proposed terms of the communication to the market accorded with what he expected should be said,[13] namely that the MRCF was "*fully funded*". Mr Brown had earlier agreed that conveying the message there were enough funds to meet the obligations to asbestos victims was essential to any separation transaction.[14] Mr Brown's evidence that he was satisfied with the proposed terms of the communication to the market was given prior to him answering questions as to its likely specific content,[15] which answers were virtually dictated by his own evidence as to his expectations of what had to be said and of his exchange with Mr Macdonald.

14. Fifth, the communications strategy in the board papers could not have been the source of the satisfactory communication statements. Mr Brown had already observed their unsatisfactory nature. At the meeting he said the key messages speaker was "*certainly*" not speaking "*solely to that document*".[16]

15. The slide presentation could not have been the source of the satisfactory communication statements. This was addressed in ASIC's submissions filed on 23 June 2011 (**AS**) at [118]-[124]. The Court of Appeal reasoned that the statement "*the Foundation would have sufficient funds to meet all legitimate compensation claims*" (paragraph 3 of the Draft ASX Announcement and referred to in LJ[154] ABRed2/450) could "*readily be seen as sourced*" in slides 29, 8 and 24 (CA[418] ABWhi/85.22). Slides 8 and 24 make no mention of key messages.[17] Slide 29 relevantly states under the heading "*Key Messages*": "*The Foundation expects to have enough funds to pay all claims*".[18] Mr Brown agreed that "*that falls short of a clear statement that there would be sufficient funds*". He was then asked: "*Q. I think you accept that what was indicated to you by way of key messages in the meeting was much clearer than that? A. Yes, sir.*" It was by reference to slide 29 that Mr Brown's evidence was that "*the levels of assurance that we received in the meeting about the sufficiency of funding are stronger that what is implied in these key messages*".[19] That evidence was not dependent on his answers to questions about the likely specific content of the communication. It followed inexorably from his other evidence referred to above. The appeal to the slides as the source of management's statement to the meeting of what was to be conveyed publicly, is not sustainable. The trial judge made no error in that regard.

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[11] T1958/30-1959/5 ABBla3/1240P-1241O; T1963/25-37 ABBla31245M-S; T1965/42-1966/14 ABBla3/1247U-1248H.
[12] T2055/41-2056/2 ABBla3/1366U-1367C; T2040/45-2041/2 ABBla3/2040W-2041C; LJ[152] ABRed2/449M.
[13] LJ[152] ABRed2/449M-O.
[14] T1861/7-11 ABBla3/1145E-G, T1859/10-15 ABBla3/1143F-I.
[15] T2056/13-16 ABBla3/1337H-I; T2058/6-2060/16 ABBla3/1339D-1341J.
[16] T2062/31-34 ABBla3/1343P-R.
[17] ABBlu5/2262 and 2278.
[18] ABBlu5/2283.
[19] T2061/24-32 ABBla3/1342M-Q.

16. Sixth, Mr Brown could not plausibly resist the proposition that the meeting agreed to unequivocal messages being conveyed when Mr Macdonald had said that an unequivocal statement had to be made.

17. Seventh, TS[20] does not address the proposition at LJ[194] ABRed2/460P and at AS[121] that no one submitted there was a correlation between Mr Brown's evidence as to what the meeting was told about public messages and the key messages slide.

BIL copy (TS[46]-[57])

18. This is addressed at AS[127]-[136]. ASIC makes three points in reply. First, TS[48] misstates ASIC's submission at AS[135] which was that the Court of Appeal speculated at CA[382] ABWhi/78.8 that the Draft ASX Announcement could have come into the possession of BIL during the course of the Jackson Inquiry, without that possibility being raised by any party with the Court (or by the Court itself). TS[49] confirms that Mr Terry did not make any submission to that effect.

19. Second, TS[50]-[56] address the various other ways that BIL could have come into possession of the (precise copy of the) Draft ASX Announcement, other than from Mr O'Brien or Mr Terry at the board meeting, including by being sent the document later by JHIL or via a communication in 2001 from the company prior to or after the board meeting (TS[54]). This overlooks AS[129]-[135]. Neither Mr O'Brien nor Mr Terry could have received the Draft ASX Announcement before the meeting because the document was not created until 7.24am on the morning of the meeting. Nor could they have obtained it after the meeting because by 1.11pm that day, a different version was in circulation (LJ[219] ABRed2/466R; CA[383] ABWhi/78.20), and Donald Cameron's evidence confirmed JHIL did not keep copies of draft announcements but only retained a copy of the announcement ultimately sent to the ASX (see AS[131]). For the same reason, none of Messrs O'Brien, Terry and BIL could have received it later because JHIL did not have a copy to give to any of them. The trial judge relied on Mr Cameron's evidence in this way (LJ[209] ABRed2/464D). The Court of Appeal erred in misconstruing his evidence (see AS[134]). None of the respondents has sought to defend the Court of Appeal's treatment of Mr Cameron's evidence.

20. Third, in relation to TS[57], both the trial judge and the Court of Appeal found that Mr Robb and Peter Cameron received the Draft ASX Announcement during the February 2001 board meeting (LJ[219]-[220] ABRed2/466R-467H; CA[383]) ABWhi/78.20) and none of the respondents challenges that finding.

The "*central importance*" of Mr Robb (TS[61]-[75])

21. At TS[61]-[75] Mr Terry makes submissions as to the "*[c]entral importance*" of Mr Robb. By reference to various parts of ASIC's submissions in chief, Mr Terry submits (at TS[63]) that "*ASIC needs ... to rely on inferences about Mr Robb's conduct in circumstances where ... it was in a position to call him but chose not to do so.*" This contention, which is critical to much of the respondents' submissions, inverts the true position in that it is the respondents who need to speculate and, if necessary, draw inferences about Mr Robb's conduct, not ASIC.

22. Other than the precise identity of which draft was before the meeting, ASIC's case on tabling and approval was proved by the minutes. To prove which draft was before the meeting, ASIC relied on Mr Baxter's evidence. Support for that evidence derived from BIL's production of the Baxter 7.24am draft. Cumulative support derived from the

production of the same draft by Allens (see AS[130]-[133]). On the basis of that evidence, the trial judge and the Court of Appeal concluded that the 7.24am draft was taken to the meeting (LJ[201] ABRed2/462U; CA[383] ABWhi/78.20) and that conclusion is not now challenged by any respondent. It is the respondents who speculate and proffer inferences about Mr Robb's conduct. They speculate as to how he could have allowed such an announcement to be approved when it had not been vetted prior to the meeting, and was so unequivocal about funding. They also speculate as to when or why he made handwritten annotations on the announcement if it was approved. It is only in answer to the respondents' conjecture about Mr Robb's conduct that ASIC points to the matters identified in the extracts from its submissions set out at TS[62].[20]

23. This is exemplified by the discussion at TS[65]-[75], which concerns the annotations on the handwritten copies of the Allens' versions of the announcements. TS[70] submits that Mr Robb could have given evidence concerning the "*extent to which the amendments represent views that he held*" which were discussed with management "*and whether those amendments record advice given by him to the company*" (see also TS[75]). He might have, but it was no part of ASIC's case to prove these matters. In reality, it was the respondents who wanted to elicit evidence from Mr Robb that he had misgivings about the announcement, and would have counselled against its approval.[21]

24. Apart from anything else, an indisputable fact is that an announcement in unequivocal terms was made by JHIL. There is no record of any advice from Allens that the company ought not make such a statement. What would be remarkable is that a firm such as Allens would not reduce to writing such an advice if it had given it. The other indisputable fact is that Mr Macdonald told the meeting, including the Allens representatives, that JHIL had to be able tell stakeholders that there will be enough funds or the plan would not work (LJ[148]-[149] ABRed2/448T-449D; CA[393] ABWhi/81.01). He did not say that the ability to make the statement depended on Allens' approval. Furthermore, the "*plan*", namely the MRCF, was approved by the board without demur to Mr Macdonald's unequivocal prescription of an accompanying unequivocal public statement.

Procedural history in relation to the calling of Mr Robb (TS[76]-[82])

25. ASIC makes five points in reply to TS[76]-[82]. First, TS[77] does not state why timing was critical. No respondent claimed at trial that their preparation or conduct of the case was hampered by the time at which they were advised ASIC would not call Mr Robb. Second, TS[78] misstates AS[61], which is quite clear about how evidence in Court is "*tested*" (ie by cross-examination). Third, as to TS[82], none of the respondents proved (or even claimed) that they did not have the opportunity to confer with Mr Robb prior to the trial when ASIC was not able to confer with him. Fourth, the point at TS[80] is addressed at AS[74]. Mr Terry does not point to any submission he made to the effect that the

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[20] The passages from ASIC's submissions cited in TS[62(a)] , [62(b)], [62(e)] all address the respondents' submissions and the Court of Appeal's reasoning about the absence of pre-vetting of the Draft ASX Announcement. The passages cited in TS[62(c), 62(f), 62(g), 62(h)] concern the respondents' submissions and the Court of Appeal's reasoning concerning the conversation between Messrs Robb, Shafron, Macdonald and Peter Cameron on the morning of the meeting as constituting some reason why Mr Robb would not have spoken up about the announcement. The passages from ASIC's submissions cited in TS[62(c)] and [62(i)] address the respondents' submissions and the Court of Appeal's reasoning about the effect of the annotations on the copy of the Draft ASX Announcement produced by Allens.

[21] TS[67] to TS[69] speculate about the effect of his amendments. This is addressed at AS[102]-[104] and at [37]-[41] of ASIC's reply to the Hellicar respondents' submissions, and [18]-[20] of ASIC's reply to Mr O'Brien's submissions.

rationale for the obligation of fairness was the need to ensure the case did in fact "*represent the truth*". Fifth, TS[81] is misconceived. The position of a witness such as Mr Robb would not be necessarily equated with a party such as Mr Brown and, if the evidence was adverse, then leave to cross-examine would most likely have been given.

Mr Terry's arguments in relation to the "*obligation of fairness*" (TS[58]-[60])

26. Mr Terry's submissions on this topic are adopted by Mr O'Brien's submissions at [7] and by Mr Willcox's submissions at [4] and [8]. They are not referred to in the Hellicar respondents' submissions, nor are they referred to in Mr Shafron's submissions.

Mr Terry's contention that ASIC "*admitted*" it was under an obligation of fairness

10 27. Mr Terry suggests that ASIC "*admitted*" it was under an obligation of fairness (for example, TS[58], [60], [83]). It did not accept it was under an obligation of the kind and with the consequences found by the Court of Appeal.

28. As the transcript reproduced at footnote 34 of AS makes clear, ASIC disavowed any suggestion that it was subject to "*some higher degree of fairness, which has some legal consequence in the proceedings*" (Court of Appeal transcript T447/18-27). Nor does anything in the passage reproduced in TS[99] (T498/39-499/18) suggest a concession by ASIC of an obligation of the kind found by the Court of Appeal. The position there stated by ASIC's senior counsel was an acceptance that the duties of ASIC go beyond those of a normal civil litigant who acts only in his or her or its private interest. Acceptance of such
20 duties, embodied in the model litigant obligations, necessarily follows from recognition that public bodies such as ASIC have no private interest in the performance of their functions.[22]

29. Contrary to TS[84] nothing in ASIC's submissions denies that the obligation of the Crown to act fairly in conducting proceedings was recognised well before the *Legal Services Directions* were first issued in 1999 (cf TS[84]): see AS[52]. Nor does ASIC contend that the *Legal Services Directions* provide an exhaustive statement of the Commonwealth's obligation to act as a model litigant (cf TS[84]): see AS[22(a)], [34(c)], [51].[23]

30. Further, none of *Cantarella* (cf TS[104], [105]), any other Australian case concerning model litigant principles, any case from a comparable jurisdiction, the *Legal Services*
30 *Directions* themselves, or similar model litigant policies from other jurisdictions has anything to say about the calling of witnesses by a public body.[24]

A "*significant body Australian case law to this effect*"

31. None of the cases referred to by Mr Terry at TS[86]-[104] provides support for an obligation of fairness of the kind sought to be imposed by the Court of Appeal, with evidentiary consequences in the event of non-compliance. In particular, not one of the cases: (a) has anything to say about the calling of witnesses by a public body; (b) suggests an unqualified obligation imposed on ASIC in the conduct of litigation "*not to be influenced by tactical or forensic decisions*"(cf TS[93] and [110]); or (c) suggests an obligation of a public body in civil (including civil penalty) proceedings to ensure that its
40 case does in fact represent the "*truth*" (CA[717] ABWhi/132.46; cf TS[107] and cf the duty

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[22] See the cases cited at AS footnote 35.
[23] See also the reference to the standards "*embodied*" in the model litigant obligation at AS[56].
[24] See AS[55].

of a Crown Prosecutor, as explained by Deane J in *Whitehorn v R* (1983) 152 CLR 657 at 663-664), bearing in mind that ASIC does not pursue a case that it knows to be untrue (which would constitute an abuse of process if it did).

32. The decisions of the Victorian Supreme Court noted in TS[90] and [91] do not purport to extend the responsibilities of a model litigant to the calling of witnesses or proof of facts. Nor does the decision of Austin J in *ASIC v Rich* (2009) 75 ACSR 1 assist the respondent (cf TS[94]). At [60] Austin J observed that, in the absence of any duty akin to prosecutorial fairness (which his Honour rejected), ASIC was not under a duty in civil proceedings to call any particular witnesses. The Victorian Court of Appeal expressed a similar view in *ASIC v Lindberg (No 2)* (2010) 26 VR 355 at [51].

33. As to TS[101]-[102] and the authorities referred to therein, ASIC does not contend that there is any clear dichotomy between criminal and civil penalty proceedings. However, as the Court of Appeal observed in the instant case (CA[689] ABWhi/128.11) nothing in the Court's analysis in *Rich* suggests it is appropriate to reason "*by analogy*" from criminal procedure to civil penalty proceedings. Section 1317L of the *Corporations Act 2001* (Cth) treats them as civil proceedings.

Not to be influenced by "*tactical or forensic considerations*"

34. Mr Terry repeatedly asserts that ASIC ought "*not to be influenced by tactical or forensic considerations*" (eg TS[93] and [110]). The Court of Appeal said nothing to that effect. It is a construct introduced by Mr Terry and only begs the question as to what is meant by a "*tactical or forensic*" consideration. The comments of Jacobson J in *ASIC v Citigroup Global Markets Australia Pty Ltd (No 3)* [2007] FCA 393 at [13] were made in the context of an application by an industry intervener to be heard as to the application of parts of the *Corporations Act* (and the *Australian Securities and Investments Commission Act 2001* (Cth)) to the facts as may be found at trial. His Honour was expressing his expectation that ASIC's submissions as to the proper construction of that legislation would not be affected by "*tactical or forensic considerations*". This is consistent with all the authorities in relation to model litigants which ASIC fully embraces. However, Jacobson J was not directing comments as to the approach ASIC was to adopt in that case in seeking to prove the facts in issue.

35. Neither Mr Terry nor any decision which he invokes undertakes any analysis of what constitutes impermissible "*tactical or forensic considerations*" in the course of, for example, calling and cross-examining witnesses in proceedings where the chosen method of trial is the "*rules of evidence and procedure for civil matters*" (s 1317L). Crown Prosecutors routinely make decisions affected by "*tactical or forensic considerations*" in the course of criminal proceedings, especially as to the manner in which they will cross-examine the accused and his or her witnesses. Whether those decisions breach some applicable standard is assessed against long standing and well defined standards and rules governing the conduct of Crown Prosecutors (and cross-examiners).[25]

The obligation to "*represent the truth*"

36. Mr Terry contends that ASIC is obliged to ensure the case it presents does "*in fact represent the truth*" (TS[108]), and that ASIC has pursued a case on the basis of "*selective or incomplete evidence*" which "*does not in fact represent what occurred*" (TS[110]).

[25] See, for example, NSW Bar Rule 84; *Libke v The Queen* (2007) 230 CLR 559 esp at [121]-[133] per Heydon J.

37. It does not appear to be contended by Mr Terry that ASIC presented a case that it "*knew*" to be false and thus any suggestion of an abuse of process can be put aside. Otherwise, this argument ignores that s 1317L of the *Corporations Act* reveals that the method chosen by Parliament for ascertaining the "*truth*" is the "*rules of evidence and procedure for civil matters*". This involves an adversarial method. The Court of Appeal has determined that there needs to be a modification of the adversarial system (CA[717] ABWhi/132.46) to introduce characteristics of an inquisitorial system. This approach has no foundation in the legislation or authority.

"*Failure to meet fair dealing standard*" (TS[111]-[117])

10 38. The position in relation to Mr Robb and the evidence which he "*could be expected to have been able to give*" (TS[111]-[117]) has been addressed above at [21]-[24] and at [6]-[9] of ASIC's reply to Mr Willcox's submissions. The contention in TS[112] that, even if Mr Robb had little recollection of the events in question, ASIC should have called him so that the respondents could cross-examine him confirms that the practical consequences of the "*obligation of fairness*" are not to address the "*truth*" but to secure to the respondents the tactical advantage of cross-examining witnesses they do not wish to call themselves.

"*Consequences of failure to act fairly in the conduct of the proceeding*" (TS[118]-[124])

39. This is addressed at [2]-[13] of ASIC's reply to the Hellicar respondents' submissions.

"*Criticisms by ASIC*" (TS[125]-[136])

20 40. As to Mr Terry's submissions in relation to ASIC's criticism of the Court of Appeal's enunciation of an obligation of fairness (TS[125]-[136]), ASIC replies briefly as follows.

41. First, s 180 (and its equivalent in predecessor legislation) has been the subject of careful judicial elucidation in a considerable body of jurisprudence, as well as the subject of comprehensive consideration by parliamentary and law reform bodies, such as the Cooney Committee and the Australian Law Reform Commission, and in explanatory material (cf TS[125]-[136]).[26] By contrast, the "*obligation of fairness*" was identified first by the Court of Appeal. The rationale of the obligation enunciated by the Court of Appeal to ensure that the case presented "*does in fact represent the truth*" was not advanced by Mr Terry at trial or in the Court of Appeal, nor canvassed by the Court of Appeal in oral argument. Nor had 30 the evidentiary consequences of non-compliance with such obligation previously been articulated or considered by any court or body. They were certainly unknown to ASIC at the time of the decision at trial not to call Mr Robb.

42. Second, Mr Terry's contentions (at TS[131]) are addressed at [11] of ASIC's reply to Mr Shafron's submissions.

43. Third, in relation to TS[132]-[138]:

(a) as to the decision of the Victorian Court of Appeal in *R v Su* [1997] 1 VR 1, Mr Terry advances no reason for considering it unlikely that, ASIC having made Mr Robb available to be called by any of the respondents, the trial judge would have declined to grant leave to one or more of the respondents, having like interest as the 40 respondent calling Mr Robb, to cross-examine him;

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[26] See for example AS at footnotes 26, 27, 27 and 33.

(b) the reliance by Mr Terry at TS[133] on *Whitehorn* and *R v Apostilides* (1984) 154 CLR 563 overlooks that as the law stood at the time of trial, ASIC was not obliged either to call a witness (even if it did not wish to lead evidence), or to provide reasons for concluding that the witness' evidence was so unreliable as to justify them not being called. Moreover, as previously submitted at AS[60]-[61], there is nothing in the factual background which suggests any greater capacity on the part of ASIC than the respondents to test the extent to which the content of Mr Robb's partial unsigned draft statement represented the evidence he would give if called; and

10 (c) at TS[134]-[135], Mr Terry returns to the proposition from *Whitehorn* that, although a trial does not involve "*the pursuit of truth 'by any means'*", it nonetheless involves "*the pursuit of truth*". This only begs the question as to the method by which truth is pursued which, in this case, is by applying the rules of evidence and procedure for civil matters (s 1317L).

44. Fourth, as to the suggestion at TS[136] that the need for an explanation of the decision not to call Mr Robb was squarely raised at trial, this overlooks that at trial no submission was made by any party that ASIC was subject to an obligation of fairness which required it to call Mr Robb, much less that its underlying rationale was the need to ensure that its case represented the "*truth*". At trial, it was only submitted formally on behalf of Mr Terry that ASIC had the same duty as a prosecutor to call material witnesses. On that basis, Mr Terry
20 sought a stay. Consistent with *Adler v Australian Securities and Investments Commission* (2003) 179 FLR 1, he conceded that it was inevitable that the application would be refused and no argument proceeded in respect of it.[27]

45. Otherwise, the respondents all sought to invoke the principles in *Jones v Dunkel* and *Whitlam* concerning the need for diligence in calling evidence in order to satisfy the standard in *Briginshaw*. In particular, *Blatch v Archer* was not referred to in any of the respondents' written or oral submissions at trial or in any of their oral submissions in the Court of Appeal, and was the subject of very limited comment in the written submissions of the Hellicar respondents and Mr Willcox.[28]

Dated: 12 August 2011

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[27] T1270/26-1272/40.
[28] ABOra1/90G-S; ABOra2/263Q-264D, 268M-W.