

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

and

MICHAEL CHRISTODOULOU KING
First Respondent

and

ACN 101 634 146 PTY LTD (IN LIQUIDATION)
Second Respondent

APPLICATION FOR SPECIAL LEAVE TO APPEAL

The applicant applies for special leave to appeal from part of the judgment of the Court of Appeal of the Supreme Court of Queensland in *King & Ors v Australian Securities and Investments Commission* [2018] QCA 352: namely, Court of Appeal number 6320 of 2017.

Part I: Proposed grounds of appeal and orders sought

Proposed ground of appeal

1. The Court of Appeal erred by concluding (QCA at [249]) that it was necessary for the applicant (ASIC) to prove that the first respondent (**Mr King**) acted in an “office” of MFS Investment Management Pty Ltd (**MFSIM**)¹ – that is, “a recognised position with rights and duties attached to it” (QCA at [246]) – in order for Mr King to be an “officer” of MFSIM for the purposes of s 601FD and s 9(b)(ii) *Corporations Act 2001* (Cth) (**CA**).

Proposed orders

2. The appeal be allowed.

¹ The second respondent. ASIC filed a cross-appeal in the proceeding below, which named MFSIM as a party and it has therefore been named as a party in this application.

Filed on behalf of the Applicant
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Date of filing: 15 January 2019

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3. Orders 1, 2 and 7 of the orders made by the Court of Appeal dated 18 December 2018 in Appeal 6320 of 2017 be set aside and in their place the appeal to the Court of Appeal be dismissed.
4. To the extent the Court of Appeal orders otherwise, the first respondent pay the applicant's costs of the appeal to the Court of Appeal.
5. The first respondent pay the applicant's costs of the appeal to this Court.

Part II: Special leave question

6. In order to be an "officer" of a corporation for the purposes of ss 601FD and 9(b)(ii) of the CA must a person act in an office of the corporation (in the sense of a recognised position with rights and duties attached to it) or is it sufficient if the person:
 - (a) is involved in the management of the corporation; and
 - (b) by reason of that involvement, has the capacity to significantly affect the financial standing of the corporation?

Part III: Brief statement of the applicant's argument

Factual background

MFS Ltd, MFSIM and their facilities

7. MFS Ltd was the parent company of the MFS Group of companies which in 2007 comprised a multitude of companies which fell into two categories: tourism and travel-related businesses (**the Stella Group**); and, funds investment and financial services businesses including managed investment schemes (QCA at [2]).
8. The Premium Income Fund (**PIF**) was one of the registered managed investment schemes in the MFS Group. MFSIM was the responsible entity for PIF. PIF was MFSIM's "flagship fund"; as at 31 October 2007 it had total funds under management of approximately \$787 million. PIF invested retail investors' funds in equities, debt instruments, cash and registered mortgages and investors would receive monthly distributions (QCA at [3]).
9. In its role as responsible entity of PIF, MFSIM entered into a \$200 million facility with the Royal Bank of Scotland (**RBS**) on 29 June 2007 (QCA at [4]).

10. On 1 June 2007, MFS Castle Pty Ltd (a wholly-owned subsidiary of MFS Ltd), entered into a short-term loan facility with Fortress Credit Corporation (Australia) II Pty Ltd (**Fortress**) for \$250 million for purposes unrelated to PIF. The loan was guaranteed by MFS Ltd and another wholly-owned subsidiary, MFS Financial Services Pty Ltd. The whole \$250 million was drawn down on 1 June 2007 and was paid to MFS Administration Pty Ltd, the group's treasury company. The loan was supposed to be repaid by 31 August 2007. In the meantime, MFS Ltd hoped to sell the Stella Group or finalise a \$450 million corporate banking facility to enable the Fortress loan to be repaid. This did not happen and the Fortress facility was extended to 30 November 2007 (QCA at [6]).
- 10 11. In November and December 2007, a total of \$147.5 million of PIF's money (drawn from the RBS facility) was used to pay the debts of companies within the MFS Group for which PIF was not actually or contingently liable, without any promise of repayment and without proper security. PIF and its investors were thereby exposed to the risk (which eventuated) that PIF's moneys would not be restored to it. A summary of the critical steps by which this occurred is set out in **Annexure B** (QCA [13], [29], [110]).

Mr King's role in MFSIM

12. Mr King was the Chief Executive Officer (**CEO**) and executive director of MFS Ltd until 21 January 2008 (QCA at [20]). He was also a director of MFSIM until his resignation from that position on 27 February 2007 (QCA at [19]). However, he continued in the role of CEO of MFS Ltd after February 2007, and he remained involved in various aspects of the management of MFSIM after he resigned as a director (QCA at [19], [250]-[285]). Mr King acknowledged that as CEO of the MFS Group he had "overall responsibility for MFSIM" (QCA at [19]). Mr White, who at all material times was Deputy CEO of the MFS Group (QCA at [21]) and an executive director of MFSIM, took instructions/directions from Mr King on "proprietary matters" of MFSIM's business (QCA at [19]). Mr King's involvement in giving instructions/directions also extended to the funds management side of MFSIM's business, including the above-described use of PIF's moneys (QCA at [162]-[163]).

Decision of the primary judge

- 30 13. The primary judge was satisfied that MFSIM had breached its duties as PIF's responsible

entity and thereby contravened s 601FC(1)(a), (c) and (k) CA. Mr King was found at first instance and on appeal to have been a person involved in MFSIM's contraventions in respect of the November 2007 payments and as a result, that he had contravened s 601FC by operation of s 601FC(5) CA (QSC at [853]).² These findings were upheld by the Court of Appeal (QCA at [228]; [229]) and are not the subject of this application for special leave.

14. Further, the primary judge was satisfied that Mr King was an "officer" of MFSIM as the responsible entity of PIF (QSC at [677]-[679]) and to have breached his duties as an officer in contravention of s 601FD(1)(a), (c), (e) and (f) (QSC at [848]; [854]).

10 15. In respect of the s 601FD contraventions, ASIC's case was that Mr King's capacity to affect significantly MFSIM's financial standing came from his overall responsibility for the operations of MFSIM and from the fact that Mr White reported directly and frequently to Mr King in the performance of Mr White's role in MFSIM and acted in accordance with Mr King's instructions (QCA at [230]; [232]).

16. Mr King argued that the s 9(b)(ii) definition of "officer" could not be satisfied because he did not act in an office within MFSIM, relying on the Full Court of the Federal Court's decision in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 (*Grimaldi*) (QSC at [670]). In that case the Full Court said at [72] that "though the Corporations Act's functional definitions do not refer explicitly to the person acting
20 in an 'office' of the corporation, this in our view is implicit in them and is made explicit in other provisions of the Act, eg s 180(1)."

17. The primary judge rejected Mr King's argument and the Full Court's construction of "officer" in *Grimaldi* (at QSC [674]). His Honour held that since Mr King had the capacity to affect significantly MFSIM's financial standing (at QSC [679]), it was not necessary that ASIC also prove that Mr King acted in an office of MFSIM. Such a requirement was,

² This application uses the acronym "QSC" to refer to the reasons for judgment of the primary judge delivered on 23 May 2016 (referred to in the proceeding below as the "Primary Reasons" or "Contravention Reasons"). The primary judge delivered reasons in relation to penalty on 26 May 2017 (referred to in the proceeding below as the "Penalty Reasons"), which included "some supplementary factual findings...so as to clarify the bases upon which individual defendants were found to have contravened the Act so as to permit the declarations about their specific contraventions to be then made." (at QCA [17]).

his Honour held, inconsistent with *obiter dicta* of the High Court in *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465; [2012] HCA 18 (*Shafron*) at [25].

Decision of the Court of Appeal

18. The Court of Appeal considered the question of Mr King's alleged status as an officer of MFSIM at [230]-[289]. Having recorded ASIC's pleaded contentions in this regard (at [230]) and the primary judge's findings (at [231]), the Court recorded Mr King's argument that he did not have a capacity to affect MFSIM's financial standing within the meaning of s 9(b)(ii) because he did not act in an office or position within MFSIM (at [238]). The Court considered relevant cases, principally *Grimaldi* and *Shafron* at [239]-[245]. At [246], the Court of Appeal expressed its inability to agree with the primary judge that there was any tension between *Shafron* and *Grimaldi*. The Court of Appeal considered that the core proposition from the relevant passage of *Grimaldi* was that an "officer" must act in an "office". The Court of Appeal considered that the High Court's remarks in *Shafron* were consistent with that proposition, because the High Court did not say that persons within s 9(b) need not act in *some* office of the corporation in the sense of a "recognised position with rights and duties attached to it".

19. At [247], the Court of Appeal expressed its agreement with the reasoning in *Grimaldi*. The Court of Appeal said that paragraph 9(b) of the definition of officer "cannot be applied literally, for otherwise a person who is, on any realistic view, unrelated to the management of a corporation, could be subjected to the burdens of the provisions of the Act with respect to officers."

20. At [249], the Court concluded that it was necessary for ASIC to prove that Mr King acted in an "office" of MFSIM. As the primary judge did not make any such finding, the Court considered whether evidence proved that he was an officer "according to what we have concluded was the correct interpretation of that term."

21. Commencing at [250], the Court of Appeal considered the evidence concerning Mr King's role in MFSIM. In doing so, the Court noted that the evidence did not climb to the level of demonstrating that Mr King acted in an office of MFSIM (e.g. at [266] and [286]).

22. At [288], the Court of Appeal concluded that ASIC had not proved its case and that any

capacity that Mr King did have to substantially affect MFSIM's financial standing was derived from his position as CEO of the MFS Group and not because he acted in some office or position within MFSIM. At [289], the Court said that had it concluded that Mr King was an officer of MFSIM, it would have concluded that he breached his duties under s 601FD.

Argument

23. The Court of Appeal erred by interpreting the definition of "officer" in s 9(b)(ii) as including a requirement for Mr King to act in an office of MFSIM.

24. **First**, the plain words of s 9(b)(ii) require consideration not of whether a person holds an office in the subject corporation, but what capacity they have to influence the corporation's financial standing. In this way, the definition of "officer" is to be contrasted with the s 9 definition of "director". Requiring a person to hold an "office" places an unnecessary gloss on the terms of the definition of "officer". Mr King is a good example of someone who, as CEO of a corporate group, involved himself in the management of a corporation in the group. He exercised the capacity he had, through such involvement, to affect significantly the financial standing of one of the subsidiary companies – in this case a responsible entity – albeit that he did not act in any particular office of the subsidiary.

25. **Second**, the legislative history of s 9(b) does not support the imposition of a requirement that an officer must act in a recognised office of the corporation. The definition of "officer" was first introduced by amendments made by the *Corporate Law Economic Reform Program Act 1999* (Cth) (**CLERP**). Prior to those amendments, the general duties of good faith, care and diligence were imposed on directors and "executive officers". An "executive officer" was defined relevantly as a person, whether or not a director, who was concerned or took part in the management of the company: s 5 of the *Companies Act 1981* (Cth); s 9 of the *Corporations Act 1989* (Cth). In *Commissioner for Corporate Affairs v Bracht* [1989] VR 821 (**Bracht**), Ormiston J said at page 830 that the concept of "management" for those purposes "comprehends activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs." It appears

that the definition of “officer” in s 9(b)(i) and (ii) was inserted by the CLERP to codify the definition in *Bracht: Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384; [2010] NSWSC 233 at [126] per White J (*Buzzle*).

26. Accordingly, consistent with the statutory history and the statutory scheme here, s 9(b)(ii) should be taken as referring to a person who, *in his or her management of the affairs of the corporation*, has the capacity to affect significantly the corporation’s financial standing: see *Buzzle* at [126] and the express terms of s 179(2) CA. Third parties external to the corporation and who have no role in its management will not meet the definition of “officer”. That addresses the issue raised by the Court of Appeal at [247] of its judgment, noted above at [19].

27. **Third**, the construction contended for by ASIC promotes the protective purposes of the provisions. The construction preferred by the Court of Appeal promotes avoidance of primary responsibility through self-serving corporate group structures (noting, in particular, the Court’s focus on the beguiling concept of a “recognised” office or position).³ The protective purposes underlying Chapter 5C, which relate to managed investment schemes such as that conducted by MFSIM, support a broader rather than a narrower interpretation of the definition.⁴

28. **Fourth**, contrary to the Court of Appeal’s reasoning at [247], the text of the CA supports ASIC’s contentions:

(a) Section 179(2) CA provides that s 9 defines both “director” and “officer”, and that an “officer” includes, as well as directors and secretaries, “*some other people* who manage the corporation or its property...” (emphasis added). The Court of Appeal’s approach replaces the language chosen by the legislature (“other people”) with quite different statutory language (“other office holders”). When the legislature wished to attach significance to office-holding it did so in express terms: see subparagraph (c)

³ For example, adopting the Court of Appeal’s view of the definition of “officer”, MFSIM could have indemnified Mr King from any liability to the company in this case despite the operation of s 199A CA. It would be an absurd result if someone in the position of Mr King could not only avoid direct liability as an officer, but could also be indemnified by the company in relation to accessorial liability. The CA ought not to be interpreted in a way which would lead to such a perverse result.

⁴ *Australian Securities and Investments Commission v Lewski* [2018] HCA 63 at [52]; *Wellington Capital Ltd v ASIC* (2014) 254 CLR 288 at 300 [14]; *Westfield Management Limited v AMP Capital Property Nominees Limited* (2012) 247 CLR 129 at 144-145 [49].

below.

(b) The definition of “director” in s 9 is to be contrasted with that of “officer of a corporation”. The definition of “director” deploys language which makes clear that such a person must either be appointed to the relevant position or act in that position (so-called “de facto directors”), or that the directors act in accordance with their instructions or wishes (so-called “shadow directors”). In contrast, the “officer of a corporation” definition includes such persons but extends that definition to persons in sub-paragraph (b) who have no particular position in the company but who have the other nominated attributes and capacities.

10 (c) The definition of “officer of an entity” in s 9 further emphasises that point. Sub-paragraph 9(b) expressly refers to “an office holder” of an unincorporated association, but the “office holder” requirement does not extend to sub-paragraph 9(c), which uses the same language as the s 9(b)(i) and (ii) definitions of “officer of a corporation”. The definition of “officer of an entity” thus expressly recognises that an “officer holder” in an entity is different to a person who has the capacity to affect significantly the entity’s financial standing. As noted above, this illustrates that when the legislature intended to invoke the concept of “holding an office”, it did so explicitly.

20 (d) The use of the terms “office” and “position” in ss 180, 182 and 601FD(1)(e) CA do not support the construction the Court of Appeal adopted. In *Shafron*, the High Court said that “[t]he effect of para (b) of s 180(1) is to require analysis of what a ‘reasonable person’ in the same position as the officer in question would do.”⁵ In the same passage, the High Court recognised the evident difficulty in defining, for the purposes of the conduct considered, the content of “the office held” where a person is an officer by virtue of paragraph (b)(i), (ii) or (iii) of the definition of “officer” in s 9. The High Court said that a construction which avoids that difficulty and avoids a more limited operation of s 180(1) in relation to some officers than in relation to others is to be preferred. Similarly, s 180 ought not to be construed as imposing a limitation on the operation of sub-paragraph (b) of the definition of “officer” to those

⁵ *Shafron* at [19].

people who hold some sort of “office” in the subject corporation, regardless of how minor or inconsequential that office. Rather, as the High Court in *Shafron* said (at [18]), s 180 should be construed as requiring regard to be had to “whatever responsibilities the officer concerned had within the corporation, regardless of how or why the responsibilities came to be imposed on that person” (emphasis in original).

29. **Fifth**, the approach of the Court of Appeal in particular at [246] (and similarly by the Full Court in *Grimaldi*) assumed that for a person to be an “officer” there must be *some* identifiable “office” in which that person acted. That may be consistent with the general understanding of what may constitute an officer outside of the CA, but the Court’s approach involved, in effect, using the ordinary meaning of “officer” to construe the definition provided for in s 9. However, it is circular and impermissible to construe the words of a definition by reference to the term defined.⁶ Here, the statutory definition was not ambiguous. There was no reason to impose the requirement that an officer must act in an office.
30. **Sixth**, the observations of the Full Court in *Grimaldi* relied upon by the Court of Appeal were *obiter*. The Court in *Grimaldi* was considering an appeal from a decision at first instance that Mr Grimaldi was a de facto director: *Grimaldi* at [28]. The Full Court upheld that decision. The primary judge did not decide whether Mr Grimaldi was a shadow director or an officer within s 9(b)(i) or (ii). The Full Court’s observations on the meaning of “officer” did not form part of the ratio of the case. The Court of Appeal was thus not bound to follow *Grimaldi* (cf QCA at [247]).
31. **Seventh**, the observations in *Grimaldi* were inconsistent with the High Court’s statement in *Shafron* at [25] (albeit itself *obiter*) that “[p]ersons identified in the other paragraphs all hold a named office in or in relation to the company; those identified in para (b) do not.” The High Court also there said that it is not to be supposed that persons falling within the definition of officer in s 9(b)(i) (and by necessary extension s 9(b)(ii)) must be in substantially the same position as directors. Those statements are inconsistent with a

⁶ *Owners of the ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419.8, referring to *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, the relevant passages being at 507.4 and 509.3 per Gibbs J. See also *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at 628 [48] per French CJ, Kiefel, Bell and Keane JJ; *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 21 [33] and 29 [60] per French CJ, Hayne, Kiefel and Nettle JJ.

requirement that, in order to be an officer, a person must act in “a recognised position with the rights and duties attached to it” (QCA at [246]).

32. **Finally**, it is apparent that the Court of Appeal’s conclusion at [288] that ASIC did not prove Mr King had the requisite capacity was based upon the Court’s view of the meaning of “officer” in this context. Indeed, the Court expressly recognised that “[t]he issue for this Court is whether the evidence proved that he was an officer, according to what we have concluded was the correct interpretation of that term”: at [249]. And the Court of Appeal said when reviewing the evidence that it did not demonstrate that Mr King “acted in an office or position of MFSIM” at [266]⁷ and [286].⁸ In other respects, the Court examined the evidence not simply by reference to whether it demonstrated Mr King’s capacity to affect significantly MFSIM’s financial standing, but by asking whether that capacity was brought about by his role as CEO of the MFS Group rather than his acting in some particular office of MFSIM: at [261],⁹ [267]¹⁰ and [279].¹¹

Reasons for special leave

33. This application raises matters of public importance:

- (a) it involves determining the proper interpretation of a significant Commonwealth legislative provision affecting the regulation of officers of companies not only in the circumstances of this case, but in myriad other circumstances;
- (b) the approach adopted by the Court of Appeal involves an unexpressed and undue narrowing of the definition of “officer” such that persons in the position of Mr King (as CEO of a corporate group involved in the management of a wholly owned subsidiary) will be beyond regulatory control as protagonists even though they have

⁷ “[T]his example does not prove that Mr King acted in an office or position of MFSIM”.

⁸ “Of the nine examples offered by ASIC’s submissions, it can be seen then that many of them did not involve Mr King performing a role which could be characterised as one from his acting in an office or position within MFSIM”.

⁹ “... the question of whether he had a role, and if so what, within MFSIM in November 2007 ...”.

¹⁰ “[T]his was not simply a proposal for the investment of PIF’s money: it was a proposal which involved the use of the resources of the MFS Group. That affects the characterisation of Mr King’s role in respect of the proposal”.

¹¹ “This email was not restricted to the business of MFSIM. It was written by Mr King in his role of CEO of the MFS Group”.

the capacity to affect significantly the financial standing of the subsidiary;

(c) until the decision of the Court of Appeal, consideration of the issue was limited in effect to the *obiter* remarks of the High Court in *Shafron* and of the Full Federal Court in *Grimaldi*. For the reasons outlined above, contrary to the finding of the Court of Appeal in the present case, there is a tension between the comments in those cases. If the Court of Appeal's error is left to stand, a state of unsatisfactory incoherence in the law will exist;

(d) there is substantial public interest in clarifying the scope of the s 9(b)(ii) definition of "officer";

10 (e) a determination of an appeal on this issue would fill a gap in the current state of the High Court's jurisprudence.

34. The applicant seeks to supplement this summary with oral argument.

Part IV: Costs

35. The applicant accepts that costs should follow the event.

Part V: Authorities

1. *Grimaldi v Chameleon Mining NL (no 2)* (2012) 200 FCR 296 at 324-325; [2012] FCAFC 6 at [71]-[73]
2. *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 at 478-479; [2012] HCA 18 at [25]
- 20 3. *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384; [2010] NSWSC 233 at [126]

Part VI: Legislation

1. Please see **Annexure A**.

Dated: 15 January 2019

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Frances Williams of Corrs Chambers Westgarth
.....
Signed by Frances Williams

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To: **The First Respondent**

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The Second Respondent

Mr Barry Hamilton as liquidator of ACN 101 634 146 PTY LTD (IN LIQUIDATION)
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TAKE NOTICE: Before taking any step in the proceedings you must, within **14 DAYS** after service of this application, enter an appearance in the office of the Registry in which the application is filed, and serve a copy on the applicant.

THE APPLICANT IS REPRESENTED BY:

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ANNEXURE A

*Corporations Act 2001*¹²Section 9

director of a company or other body means:

- (a) a person who:
 - (i) is appointed to the position of a director; or
 - (ii) is appointed to the position of an alternate director and is acting in that capacity;
- 10 regardless of the name that is given to their position; and
- (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
 - (i) they act in the position of a director; or
 - (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body.

- 20 Note: Paragraph (b)—Contrary intention—Examples of provisions for which a person referred to in paragraph (b) would not be included in the term “director” are:
 - section 249C (power to call meetings of a company's members)
 - subsection 251A(3) (signing minutes of meetings)
 - section 205B (notice to ASIC of change of address).

¹² The provisions of the *Corporations Act 2001* (Cth) in this annexure have been extracted from the current version of the Act. Save in the case of ss 199A and 601FC, the provisions are in the same terms as they existed as at 1 November 2007. Footnotes have been used to identify the difference between ss 199A and 601FC as at 1 November 2007 and now.

officer of a corporation means:

- (a) a director or secretary of the corporation; or
- (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation);
- or
- (c) a receiver, or receiver and manager, of the property of the corporation; or
- (d) an administrator of the corporation; or
- (e) an administrator of a deed of company arrangement executed by the corporation; or
- (f) a liquidator of the corporation; or
- (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else.

Note: Section 201B contains rules about who is a director of a corporation.

officer of an entity that is neither an individual nor a corporation means:

- (a) a partner in the partnership if the entity is a partnership; or
- (b) an office holder of the unincorporated association if the entity is an unincorporated association; or
- (c) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
 - (ii) who has the capacity to affect significantly the entity's financial standing.

Section 179

179 Background to duties of directors, other officers and employees

- (1) This Part sets out some of the most significant duties of directors, secretaries, other officers and employees of corporations. Other duties are imposed by other provisions of this Act and other laws (including the general law).
- (2) Section 9 defines both *director* and *officer*. *Officer* includes, as well as directors and secretaries, some other people who manage the corporation or its property (such as receivers and liquidators).

10 Section 180

180 Care and diligence – civil obligation only

Care and diligence – directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
 - (a) were a director or officer of a corporation in the corporation's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

20 Note: This subsection is a civil penalty provision (see section 1317E).

Business judgment rule

- (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
 - (a) make the judgment in good faith for a proper purpose; and
 - (b) do not have a material personal interest in the subject matter of the judgment; and
 - (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
 - 30 (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the

corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

Note: This subsection only operates in relation to duties under this section and their equivalent duties at common law or in equity (including the duty of care that arises under the common law principles governing liability for negligence) – it does not operate in relation to duties under any other provision of this Act or under any other laws.

(3) In this section:

business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

Section 182

182 Use of position – civil obligations

Use of position – directors, other officers and employees

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

- (a) gain an advantage for themselves or someone else; or
- (b) cause detriment to the corporation.

Note: This subsection is a civil penalty provision (see section 1317E).

(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: Section 79 defines ***involved***.

Note 2: This subsection is a civil penalty provision (see section 1317E).

Section 199A

199A Indemnification and exemption of officer or auditor

Exemptions not allowed

(1) A company or a related body corporate must not exempt a person (whether directly or through an interposed entity) from a liability to the company incurred as an officer or auditor of the company.

When indemnity for liability (other than for legal costs) not allowed

- (2) A company or a related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against any of the following liabilities incurred as an officer or auditor of the company:
- (a) a liability owed to the company or a related body corporate;
 - (b) a liability for a pecuniary penalty order under section 1317G or a compensation order under section 961M, 1317H, 1317HA, 1317HB, 1317HC or 1317HE;¹³
 - (c) a liability that is owed to someone other than the company or a related body corporate and did not arise out of conduct in good faith.

This subsection does not apply to a liability for legal costs.

When indemnity for legal costs not allowed

- (3) A company or related body corporate must not indemnify a person (whether by agreement or by making a payment and whether directly or through an interposed entity) against legal costs incurred in defending an action for a liability incurred as an officer or auditor of the company if the costs are incurred:
- (a) in defending or resisting proceedings in which the person is found to have a liability for which they could not be indemnified under subsection (2); or
 - (b) in defending or resisting criminal proceedings in which the person is found guilty; or
 - (c) in defending or resisting proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or
 - (d) in connection with proceedings for relief to the person under this Act in which the Court denies the relief.

Paragraph (c) does not apply to costs incurred in responding to actions taken by ASIC or a liquidator as part of an investigation before commencing proceedings for the court order.

Note 1: Paragraph (c)—This includes proceedings by ASIC for an order under

¹³ As at 1 November 2007, s 199(2)(b) read “a liability for a pecuniary penalty order under section 1317G or a compensation order under section 1317H or 1317HA.”

section 206C, 206D, 206E or 206EAA (disqualification), section 232 (oppression), section 961M, 1317E, 1317G, 1317H, 1317HA, 1317HB, 1317HC or 1317HE (civil penalties) or section 1324 (injunction).¹⁴

Note 2: The company may be able to give the person a loan or advance in respect of the legal costs (see section 212).

- (4) For the purposes of subsection (3), the outcome of proceedings is the outcome of the proceedings and any appeal in relation to the proceedings.

Section 601FC

10 **601FC Duties of responsible entity**

- (1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:

- (a) act honestly; and
- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
- (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the member's interests; and
- (d) treat the members who hold interests of the same class equally and members
20 who hold interests of different classes fairly; and
- (e) not make use of information acquired through being the responsible entity in order to:
 - (i) gain an improper advantage for itself or another person; or
 - (ii) cause detriment to the members of the scheme; and
- (f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and
- (g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and
- (h) comply with the scheme's compliance plan; and

¹⁴ As at 1 November 2007, Note 1 read: "Paragraph (c) – This includes proceedings by ASIC for an order under section 206C, 206D or 206E (disqualification), section 232 (oppression), section 1317E, 1317G, 1317H or 1317HA (civil penalties) or section 1324 (injunction)."

- (i) ensure that scheme property is:
 - (i) clearly identified as scheme property; and
 - (ii) held separately from property of the responsible entity and property of any other scheme; and
- (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
- (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and
- (l) report to ASIC any breach of this Act that:
 - (i) relates to the scheme; and
 - (ii) has had, or is likely to have, a materially adverse effect on the interests of members;

as soon as practicable after it becomes aware of the breach; and

- (m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.

- (2) The responsible entity holds scheme property on trust for scheme members.

Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.

- (3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.

- (5) A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: Subsection (5) is a civil penalty provision (see section 1317E).¹⁵

Section 601FD

601FD Duties of officers of responsible entity

- (1) An officer of the responsible entity of a registered scheme must:
 - (a) act honestly; and

¹⁵ As at 1 November 2007, s 601FC contained a sub-section (6) which read: "A person must not intentionally or recklessly be involved in a responsible entity's contravention of subsection (1)."

- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
- (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
- (d) not make use of information acquired through being an officer of the responsible entity in order to:
 - (i) gain an improper advantage for the officer or another person; or
 - (ii) cause detriment to the members of the scheme; and
- 10 (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
- (f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:
 - (i) this Act; and
 - (ii) any conditions imposed on the responsible entity's Australian financial services licence; and
 - (iii) the scheme's constitution; and
 - (iv) the scheme's compliance plan.
- 20 (2) A duty of an officer of the responsible entity under subsection (1) overrides any conflicting duty the officer has under Part 2D.1.
- (3) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.

Note 1: Section 79 defines *involved*.

Note 2: Subsection (3) is a civil penalty provision (see section 1317E).
- (4) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

Companies Act 1981**Section 5**

executive officer, in relation to a corporation, means any person, by whatever name called and whether or not he is a director of the corporation, who is concerned, or takes part, in the management of the corporation.

Corporations Act 1989**Section 9**

10 “**executive officer**”, in relation to a body corporate, means a person, by whatever name called and whether or not a director of the body, who is concerned, or takes part, in the body’s management and, in the case of a close corporation, includes a member of the body;

ANNEXURE B

1. Further to paragraph 11 of Part III of the Application for Special Leave to Appeal, the critical steps by which the \$147.5 million of PIF's money was used to pay the debts of two companies within the MFS Group, are as follows.

\$130 million and \$103 million payments in November 2007

2. In late November 2007, Mr King negotiated terms with Fortress to defer repayment of the total amount of the loan which required a payment of \$100 million together with a \$3 million extension fee by 30 November 2007, with the balance of \$150 million to be repaid by 1 March 2008. This "eleventh hour agreement" (QCA at [8]) required MFS Ltd
10 to find \$103 million to repay Fortress by 30 November 2007 (QCA at [7]-[8]).
3. On 27 November 2007, MFSIM drew down \$150 million under the RBS loan agreement. On 30 November 2007, \$130 million of that \$150 million was paid by MFSIM to MFS Administration and in turn MFS Administration paid \$103 million of the \$130 million to Fortress on the same day (QCA at [9] and [11]). In this way, the payment required to be made to Fortress on 30 November was made from funds ultimately drawn from PIF's RBS facility.
4. Mr King admitted that he knew that the \$103 million payment to Fortress was made from funds borrowed by PIF from the RBS facility (QCA [90])

\$17.5 million payment in December 2007

- 20 5. In December 2007, MFS Pacific Finance Ltd (**PacFin**) urgently needed \$16 million to meet commitments to debenture holders. On 27 December 2007, MFSIM as responsible entity for PIF paid \$17.5 million to PacFin (QCA at [12]). Mr King was not alleged to have been involved in the contraventions relating to the \$17.5 million payment.

Use of the monies paid

6. Rather than being used for the purposes of PIF, PIF's money was used to pay the debts of MFS companies for which PIF was not actually or contingently liable. As the Court of Appeal said at [5], *"It should go without saying that the law required [the RBS] facility to be used by MFSIM only for the purposes of PIF. It was not available for the use of*

other companies in the MFS Group.”

7. The primary judge and the Court of Appeal were satisfied that MFSIM had misused the \$147.5 million that belonged to PIF. As the Court of Appeal said at [13], “*PIF (and indirectly investors in that managed fund) received nothing in exchange for the payment out of \$147.5 million of money which belonged to it. PIF and its investors were thereby exposed to the risk that PIF’s money would not be restored to it, leaving PIF without even an evident promise of repayment, let alone one that was properly secured.*”