FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3) [2023] FCA 1565

File number:	VID 1153 of 2018
Judgment of:	**MOSHINSKY J**
Date of judgment:	8 December 2023
Catchwords:	**CORPORATIONS** – continuous disclosure – pecuniary penalty – where, in an earlier judgment, the Court found that the defendant had contravened s 674(2) of the *Corporations Act 2001* (Cth) – where the maximum penalty at the relevant time was $1 million – consideration of applicable principles – consideration of appropriate penalty – held: penalty of $900,000 imposed
Legislation:	*Corporations Act 2001* (Cth), ss 674, 1317DA, 1317E, 1317F, 1317G *Fair Work Act 2009* (Cth), s 546
Cases cited:	*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 *Australian Securities and Investments Commission v Austal Ltd* [2022] FCA 1231 *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; 234 ALR 511 *Australian Securities and Investments Commission v Newcrest Mining Ltd* [2014] FCA 698; 101 ACSR 46 *Australian Securities and Investments Commission v Rio Tinto Ltd (No 2)* [2022] FCA 184 *Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd (In Liq)* [2016] FCA 1488; 118 ACSR 43 *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285 *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR ¶41-076

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Date of hearing:	8 December 2023
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ORDERS

VID 1153 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)** Defendant

ORDER MADE BY: **MOSHINSKY J**

DATE OF ORDER: **8 DECEMBER 2023**

THE COURT DECLARES THAT:

1. Pursuant to s 1317E(1) of the *Corporations Act 2001* (Cth) (***Corporations Act***), Australia and New Zealand Banking Group Limited (**ANZ**) contravened s 674(2) of the *Corporations Act* on 7 August 2015, prior to the recommencement of trading in ANZ shares, by failing to notify ASX Limited either that shares in ANZ:

   (a) with a value of between approximately $754 million and $790 million; or

   (b) representing a significant proportion of the shares the subject of a $2.5 billion share placement,

   were to be acquired by underwriters of the share placement.

THE COURT ORDERS THAT:

2. ANZ pay to the Commonwealth of Australia, within 30 days of the date of these orders, a pecuniary penalty of $900,000, pursuant to s 1317G(1A) of the *Corporations Act*, in respect of the contravention of s 674(2) of the *Corporations Act* in paragraph 1 of this order.

3. ANZ pay the plaintiff's costs of and incidental to this proceeding, including the costs of and incidental to ANZ's interlocutory application dated 29 March 2019 and ANZ's amended interlocutory application dated 30 May 2019.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

Introduction

1 On 13 October 2023, I delivered judgment on liability in this proceeding: *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 2)* [2023] FCA 1217 (**Liability Reasons**). These reasons, which deal with issues of relief and costs, should be read together with those reasons. I will adopt the abbreviations used in the Liability Reasons.

2 There are three main issues to be dealt with in these reasons:

(a) the wording of the declaration of contravention of s 674(2) of the *Corporations Act 2001* (Cth) – there are some minor differences in wording in the form of orders proposed by each party;

(b) the pecuniary penalty to be imposed – ASIC contends that a pecuniary penalty of $1 million, being the maximum penalty for a single contravention of s 674(2) at the relevant time, is appropriate; ANZ contends that a penalty of up to $350,000 is appropriate; and

(c) the costs of ANZ's interlocutory application for a stay of the proceeding (see *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2019] FCA 964); ANZ seeks its costs of that application; ASIC contends that the costs of the application should form part of the costs of the proceeding (which, it is accepted, are to be paid by ANZ to ASIC).

3 I will first outline the material before the Court and set out the applicable provisions. I will then deal with each issue in turn.

Material before the Court

4 The parties have prepared and filed a statement of agreed facts (**SOAF**) for the penalty hearing. Broadly, the SOAF deals with: the size of ANZ; trading in ANZ shares between 3 August and 31 August 2015; ANZ's continuous disclosure policies (both at the relevant time and more recently); certain media releases issued by ANZ; and past contraventions by ANZ.

5 The parties rely on the evidence filed for the liability hearing. The parties have not filed any further affidavit evidence for the purpose of this hearing.

6 In advance of the hearing today, the parties filed detailed outlines of submissions.

Applicable provisions

7 In these reasons, all references to the *Corporations Act* are to the legislation in force at the relevant time, being August 2015. The relevant compilation is dated 1 July 2015.

8 Section 1317E(1) of the *Corporations Act* provided that if a Court is satisfied that a person has contravened a "civil penalty provision" (which included s 674(2)), it must make a declaration of contravention.

9 Section 1317E(2) provided:

> (2) A declaration of contravention must specify the following:
> (a) the Court that made the declaration;
> (b) the civil penalty provision that was contravened;
> (c) the person who contravened the provision;
> (d) the conduct that constituted the contravention;
> (e) if the contravention is of a corporation/scheme civil penalty provision—the corporation or registered scheme to which the conduct related.

10 Section 1317F provided that a declaration of contravention is conclusive evidence of the matters referred to in s 1317E(2).

11 Section 1317G dealt with pecuniary penalty orders and relevantly provided:

> (1A) A Court may order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum amount if:
> (a) a declaration of contravention by the person has been made under section 1317E; and
> (b) the contravention is of a financial services civil penalty provision not dealt with in subsections (1E) to (1G); and
> (c) the contravention:
> (i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
> (ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or
> (iii) is serious.

12 The expression "financial services civil penalty provision" was defined in s 1317DA in a way that included s 674(2). Under s 1317G(1B)(b), the relevant maximum amount for a body corporate was $1 million.

13 Unlike some other civil penalty provisions, s 1317G did not specify considerations that were required to be taken into account.

Declaration

14 For the reasons set out in the Liability Reasons, I am satisfied that ANZ contravened s 674(2) of the *Corporations Act*. There is no issue between the parties as to the *number* of contraventions. ASIC accepts that there was only one contravention of s 674(2).

15 In circumstances where the Court is satisfied that ANZ contravened s 674(2), the Court is required by s 1317E(1) to make a declaration. It is necessary for the declaration to specify the matters set out in s 1317E(2). Each party has put forward a form of declaration that satisfies this requirement. As noted above, there is an issue between the parties as to the form of the declaration. ASIC's proposed declaration is as follows:

> **THE COURT DECLARES THAT:**
>
> 1. Pursuant to section 1317E(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), Australia and New Zealand Banking Group Limited (**ANZ**) contravened section 674(2) of the *Corporations Act 2001* (Cth) on 7 August 2015, prior to the recommencement of trading in ANZ shares, by failing to notify ASX Limited either that shares in ANZ:
>
>   a) with an aggregate issue price of between approximately $754 million and $790 million; or
>
>   b) representing a significant proportion (approximately 31%) of those to be issued upon completion of a $2.5bn share placement,
>
> were to be acquired by underwriters of the share placement.

16 ANZ's form of declaration (marked up to show the changes it proposes to ASIC's draft) is as follows:

> **THE COURT DECLARES THAT:**
>
> 1. Pursuant to s 1317E(1) of the *Corporations Act 2001* (Cth) (***Corporations Act***), Australia and New Zealand Banking Group Limited (**ANZ**) contravened section 674(2) of the Corporations Act *2001* (Cth) on 7 August 2015, prior to the recommencement of trading in ANZ shares, by failing to notify ASX Limited either that shares in ANZ:
>
>   (a) with ~~an aggregate issue price~~ a value of between approximately $754 million and $790 million; or
>
>   (b) representing a significant proportion ~~(approximately 31%) of those to be issued upon completion~~ of the shares the subject of a $2.5 billion share placement,
>
> were to be acquired by underwriters of the share placement.

17 In my opinion, ANZ's wording for paragraph (a) is preferable as it is a simpler form of words and reflects the wording I used in the Liability Reasons at [8(a)]. Further, in my opinion, ANZ's proposed wording for paragraph (b) is preferable as it is simpler and reflects [8(b)] of the Liability Reasons.

18 In circumstances where, as here, s 1317E(1) *requires* the Court to make a declaration of contravention, it is unnecessary to consider the discretionary factors that are usually considered in the context of declarations: see *Australian Securities and Investments Commission v Austal Ltd* [2022] FCA 1231 at [59] per O'Bryan J.

19 I will therefore make a declaration in the terms proposed by ANZ.

Pecuniary penalty

Applicable principles

20 In *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 (the ***Agreed Penalties Case***), the High Court emphasised that the primary purpose of civil penalties is to secure deterrence. In contrast to criminal sentences, they are not concerned with retribution and rehabilitation but are "primarily if not wholly protective in promoting the public interest in compliance": *Agreed Penalties Case* at [55] per French CJ, Kiefel, Bell, Nettle and Gordon JJ; see also at [110] per Keane J. This point was also emphasised by the High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450 (***Pattinson***) at [15]-[16], [43], [45], [55] per Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ.

21 In many cases dealing with the imposition of a pecuniary penalty for contravention of the continuous disclosure obligation in s 674(2), reference has been made to the judgment of French J (as his Honour then was) in *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; 234 ALR 511 (***Chemeq***), where his Honour stated at [99]:

> From the preceding discussion I extract the following factors relevant to the level of penalty for contravention of the continuous disclosure provisions. The list is non-exhaustive:
>
> (1) The extent to which the information not disclosed would have been expected to and (if applicable) did affect the price of the contravening company's shares: s 674(2)(c).
>
> (2) The extent to which the information, if not generally available, would have been discoverable upon inquiry by a third party: s 676(2).
>
> (3) The extent (if any) to which acquirers or disposers of the company's shares

were materially prejudiced by the non-disclosure: s 1317G(1A).

(4) The extent to which (if at all) the contravention was the result of deliberate or reckless conduct by the corporation.

(5) The extent to which the contravention was the result of negligent conduct by the corporation.

(6) The period of time over which the contravention occurred.

(7) The existence, within the corporation, of compliance systems in relation to its disclosure obligations including provisions for and evidence of education and internal enforcement of such systems.

(8) Remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention.

(9) The seniority of officers responsible for the non-disclosure and whether they included directors of the company.

(10) Whether the directors of the corporation were aware of the facts which ought to have been disclosed and, if not, what processes were in place at the time, or put in place after the contravention to ensure their awareness of such facts in the future.

(11) Any change in the composition of the board or senior managers since the contravention.

(12) The degree of the corporation's cooperation with the regulator including any admission of contravention.

(13) The prevalence of the particular class of non-disclosure in the wider corporate community.

22 In addition to these matters, other relevant considerations include the size of the contravening company: see *Pattinson* at [18], citing factors relevant to the assessment of penalty set out by French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR ¶41-076 (***CSR***). Further, it is relevant to consider whether the contravenor has engaged in other conduct of a like kind. Having set out the factors referred to by French J in *CSR*, the plurality in *Pattinson* noted that these factors included matters pertaining to both the character of the contravening conduct and the character of the contravenor.

23 The plurality in *Pattinson* held (at [10], [38]) that the "notion of proportionality", in the sense in which that expression is used in the criminal law, could not be translated coherently into civil penalty regimes. The plurality (at [40]) approved the following statement of Burchett and Kiefel JJ in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285 (***NW Frozen Foods***) at 293:

> [I]nsistence upon the deterrent quality of a penalty should be balanced by insistence that it 'not be so high as to be oppressive'. Plainly, if deterrence is the object, the

> penalty should not be greater than is necessary to achieve this object; severity beyond that would be oppression.

24 The plurality in *Pattinson* stated (at [41]) that it may therefore be accepted that s 546 of the *Fair Work Act 2009* (Cth) (the pecuniary penalty provision there in issue) "requires the court to ensure that the penalty it imposes is 'proportionate', where that term is understood to refer to a penalty that strikes a reasonable balance between deterrence and oppressive severity".

25 The plurality in *Pattinson* considered the role of the prescribed maximum penalty, holding (at [10], [49]) that the Full Court of the Federal Court had erred in treating the maximum penalty as reserved for only the most serious examples of the relevant offending. At [50], the plurality said that "[c]onsiderations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind". The plurality stated at [53] that, in a civil penalty context, the relevance of a prescribed maximum penalty as a "yardstick" was explained by the Full Court of the Federal Court in *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 at [155]-[156], where the Full Court said:

> 155 The reasoning in *Markarian* about the need to have regard to the maximum penalty when considering the quantum of a penalty has been accepted to apply to civil penalties in numerous decisions of this Court both at first instance and on appeal (*Director of Consumer Affairs, Victoria v Alpha Flight Services Pty Ltd* [2015] FCAFC 118 at [43]; *Australian Competition and Consumer Commission v BAJV Pty Ltd* [2014] FCAFC 52 at [50]-[52]; *Setka v Gregor (No 2)* (2011) 195 FCR 203; [2011] FCAFC 90 at [46]; *McDonald v Australian Building and Construction Commissioner* (2011) 202 IR 467; [2011] FCAFC 29 at [28]-[29]). As *Markarian* makes clear, the maximum penalty, while important, is but one yardstick that ordinarily must be applied.
>
> 156 Care must be taken to ensure that the maximum penalty is not applied mechanically, instead of it being treated as one of a number of relevant factors, albeit an important one. Put another way, a contravention that is objectively in the mid-range of objective seriousness may not, for that reason alone, transpose into a penalty range somewhere in the middle between zero and the maximum penalty. Similarly, just because a contravention is towards either end of the spectrum of contraventions of its kind does not mean that the penalty must be towards the bottom or top of the range respectively. However, ordinarily there must be some reasonable relationship between the theoretical maximum and the final penalty imposed.

26 After setting out that passage, the plurality in *Pattinson* (at [54]-[55]) emphasised two aspects of the Full Court's reasoning. The first was their Honours' recognition that the maximum penalty is "but one yardstick that ordinarily must be applied" and must be treated "as one of a number of relevant factors". The second was that the maximum penalty does not constrain the

exercise of the discretion under s 546 of the *Fair Work Act* (or its analogues in other Commonwealth legislation), beyond requiring "some reasonable relationship between the theoretical maximum and the final penalty imposed".

27 The plurality in *Pattinson* recognised (at [45]) that principles relating to totality, parity and 'course of conduct' could be useful analytical tools in the context of civil penalties. In the present case, which concerns only one contravention, it is unnecessary to consider totality and 'course of conduct'.

Consideration

28 As set out above, s 1317G(1A) provides that the Court may order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum amount ($1 million) if three conditions, set out in paragraphs (a), (b) and (c), are satisfied. In the present case, paragraph (a) is satisfied as a declaration of contravention by the person will have been made under s 1317E. Paragraph (b) is satisfied because the contravention is of a financial services civil penalty provision not dealt with in subsections (1E) to (1G) of s 1317G. Paragraph (c) sets out three alternatives. Having regard to the contravention being of s 674(2) of the *Corporations Act*, ANZ admits that its contravention is *serious* within the meaning of sub-paragraph (iii) of s 1317G(1A)(c): see the SOAF, [25]. It is therefore unnecessary to consider the other two alternatives in paragraph (c). Accordingly, the discretion to impose a pecuniary penalty is enlivened.

29 As noted above, ASIC contends that an appropriate penalty is $1 million (being the maximum penalty under the legislation), while ANZ proposes a penalty of up to $350,000.

30 In summary, ASIC contends that ANZ, one of Australia's major publicly-listed companies, with 2014/2015 annual revenue and cash net profit of $20.537 billion and $7.216 billion respectively, and a current market capitalisation among the highest on the ASX, contravened a rule protective of the public interest of enhancing the integrity and efficiency of capital markets. ASIC submits that, despite having continuous disclosure policies in place, ANZ contravened the disclosure rules during a public fundraising through the actions and omissions of very senior executives. ASIC submits that ANZ's contravention is one for which it has not shown contrition, nor did it co-operate with ASIC in the course of a proceeding that was fought, on many lines of defence, all the way through to the end of a trial. ASIC submits that a penalty of $1 million, albeit the maximum the Court can award in this case, is manifestly insufficient

to deter ANZ from future contraventions. In these circumstances, ASIC submits, it is important to impose the maximum penalty.

31 In summary, ANZ submits: first, there is little, if any, imperative to achieve specific deterrence in the particular circumstances of this case; secondly, considerations of general deterrence are likewise of limited significance in the present circumstances; and thirdly, this is not a case where the contravention was shown to have been in any way profitable for the company or harmful to the market.

32 I will now consider the various factors referred to in *Chemeq*, and then consider other relevant matters.

Effect of non-disclosure on price, material prejudice and non-discoverability (Chemeq 1, 2 and 3)

33 In the present case, as ANZ submits, the evidence does not establish a quantifiable impact on the price of ANZ shares. I also accept ANZ's submission that ASIC did not seek to make a case that the non-disclosed information affected the *value* of the ANZ shares. Nevertheless, it remains the case that information that was required by law to be disclosed to the market, was not disclosed, and therefore market participants did not have available to them information that should have been disclosed during (at least) the days after the Placement. I also note that a very large volume of ANZ shares traded during the days after the Placement. On 7 August 2015 alone, approximately 36.3 million ANZ shares, with a total value of approximately $1.1 billion, were traded on-market: SOAF, [9].

34 In relation to the discoverability or otherwise of the relevant information, it was not easily discoverable. It will be recalled that the investment banks were concerned to ensure that, so far as legally possible, the information not be disclosed.

Extent to which the contravention was as a result of deliberate, reckless or negligent conduct (Chemeq 4 and 5)

35 There is no evidence to suggest that the contravention was the result of a deliberate decision by ANZ not to comply with its continuous disclosure obligations.

36 In August 2015, ANZ had a Continuous Disclosure Policy and a Continuous Disclosure Committee Charter: SOAF, [12]. This provided that ANZ's Chief Executive Officer, Chief Financial Officer, Group General Counsel, Group General Manager Investor Relations and the Group General Manager Corporate Communications (the "Disclosure Officers") were

responsible for making decisions in relation to information that may be disclosed to the ASX and were responsible for reviewing information to determine whether disclosures were required in order to comply with the requirements of the Listing Rules of the ASX: SOAF, [12].

37 The SOAF contains the following agreed facts:

> 14 By at least the morning on 7 August 2015, before markets opened, one or more of the Disclosure Officers, as well as senior employees of ANZ Richard Moscati (ANZ's Group Treasurer) and John Needham (ANZ's Head of Capital and Structured Funding), knew that the underwriters would acquire between $754,000,000 and $790,000,000 (or approximately 31%) of the shares in the Placement.
>
> 15 ANZ, via its Continuous Disclosure Committee, did not consider on or after 8.35pm on 6 August 2015 whether the Underwriter Acquisition Information or Significant Proportion Information (as defined in paragraph 8 of *ASIC v ANZ (No.2)* [[2023] FCA] 1217, the liability judgment) should be disclosed to the ASX.

38 Beyond this, the evidence does not explain how the contravention came about. It is not suggested, for example, that the Continuous Disclosure Committee deliberated on whether the information needed to be disclosed and formed the view that it did not need to be disclosed. Rather, the position is that members of the committee who were aware of the information *did not consider* whether the information needed to be disclosed to the ASX. To the extent that ANZ submits that this was reasonable in the rare and unusual circumstances, including ANZ's awareness of the Underwriters' intentions, I do not accept this submission. In my view, the failure to consider whether the information needed to be disclosed represents a failing of ANZ's systems and processes.

Period of time over which the contravention occurred (Chemeq 6)

39 Unlike cases where there is a corrective disclosure, here ANZ did not make a corrective disclosure. Its contravention was, therefore, ongoing.

Existence of compliance systems, and provision for and evidence of education and internal enforcement of such systems (Chemeq 7), remedial and disciplinary steps (Chemeq 8)

40 At all relevant times, ANZ had a continuous disclosure policy in place and a Continuous Disclosure Committee Charter: SOAF, [12]. However, in the event, these systems were inadequate to ensure that ANZ complied with its continuous disclosure obligation.

41 ANZ has taken steps to improve its compliance systems in relation to continuous disclosure: see SOAF, [17]-[18].

Seniority of officers involved (Chemeq 9), knowledge of directors, and processes to inform directors of the facts that ought to have been disclosed (Chemeq 10), change in senior officers or directors (Chemeq 11)

42 The ANZ officers involved in ANZ's contravention of its continuous disclosure obligation comprised very senior management of the company. Some are still in senior positions at ANZ, while others are no longer employed by ANZ: SOAF, [16].

Degree of co-operation with the regulator including any admission of contravention (Chemeq 12)

43 ANZ contested the issue of liability, as it was entitled to do. ANZ participated in a mediation, but I do not consider that any significant weight is to be placed on this. ANZ has not co-operated in such a way that would cause a reduction in the penalty otherwise to be imposed.

Prevalence of this particular class of non-disclosure in the wider non-corporate community (Chemeq 13)

44 It is difficult to assess the prevalence of non-disclosure of information of the kind in issue in this case. The evidence of Mr Pratt at the liability trial was that it was rare for there to be a shortfall. Accordingly, the situation probably does not arise very often.

Other considerations

45 ANZ is a very large company. ANZ's market capitalisation for the year ending 30 September 2023 was $77,116 million: SOAF, [8]. ANZ's total revenue for the year ending 30 September 2015 was $20,537 million: SOAF, [7]. Its net profit for the same year was $7,216 million: SOAF, [7]. The size of ANZ suggests that a large penalty is required to serve the purposes of specific and general deterrence. To the extent that ANZ submits that there is no need for a sizeable penalty to be imposed for the sake of specific deterrence because the Liability Reasons and the declaration to be made sufficiently bring home to ANZ the need to comply in the future, I do not accept that submission. In my view, a large penalty is also necessary to make sure that the senior management of ANZ appreciate the reasons for the failure that occurred in this case and take steps to ensure it does not happen again.

46 ANZ has not previously contravened its continuous disclosure obligation. While ANZ has contravened other provisions, and been ordered to pay substantial penalties for those contraventions, for present purposes the focus is on other like contraventions, that is, other contraventions of the continuous disclosure obligation.

47 Annexure A to ASIC's submissions sets out the penalties imposed in other cases involving contravention of s 674(2). I note that, in some cases, a penalty of $750,000 or $800,000 has been imposed for a single contravention of the provision: see, eg, *Australian Securities and Investments Commission v Sino Australia Oil and Gas Ltd (In Liq)* [2016] FCA 1488; 118 ACSR 43 ($800,000); *Australian Securities and Investments Commission v Newcrest Mining Ltd* [2014] FCA 698; 101 ACSR 46 ($800,000); and *Australian Securities and Investments Commission v Rio Tinto Ltd (No 2)* [2022] FCA 184 ($750,000). However, the circumstances of each case are different, and very little, if anything, can be drawn from the penalties awarded in those cases. Further, I note that some of those cases were agreed penalty cases, which reduces their utility as a guide.

Conclusion on penalty

48 Having regard to the circumstances of this case and in particular the matters set out above, I consider that a very high penalty is required for the purposes of specific and general deterrence. ANZ's contravention of its continuous disclosure obligation was, in my view, very serious. ANZ is a very large company and there was a high turnover of its shares in the days after the Placement. The evidence and the SOAF show that its systems and policies failed to make sure that the market was informed of information that was required to be disclosed under s 674. A very large penalty is required to ensure that ANZ and other market participants comply with their continuous disclosure obligations.

49 In all the circumstances, I consider a penalty of $900,000 to be appropriate and to be necessary to achieve the objects of specific and general deterrence. The plurality in *Pattinson* approved the statement in *NW Frozen Foods* that, given deterrence is the object, the penalty should not be more than necessary to achieve this object; and severity beyond it would be oppression. In my view, a penalty of $900,000 is not greater than what is necessary to achieve the object of deterrence. I do not consider it to be oppressive. While a penalty of $900,000 is not as high as sought by ASIC, this is because the maximum penalty ($1 million) is a relevant yardstick in determining an appropriate penalty. I will therefore impose a pecuniary penalty of $900,000.

Costs

50 It is common ground that, in relation to the proceeding generally, there should be an order that ANZ pay ASIC's costs.

51 The only issue between the parties in relation to costs concerns ANZ's interlocutory application seeking a stay of the proceeding. That application was opposed by ASIC. ANZ was successful in obtaining a stay of the proceeding pending the resolution of criminal proceedings. The costs of the application were reserved at the time.

52 ANZ submits that it should have its costs of the interlocutory application on the basis of the usual position that costs follow the event. It submits that the relevant "event" is the outcome of the interlocutory application. In my view, the interlocutory application concerned the conduct of the proceeding generally and therefore it is appropriate that the costs of the application form part of the overall costs of the proceeding, rather than being treated as a discrete matter.

53 Accordingly, I will make an order that ANZ pay ASIC's costs of the proceeding, including the costs of ANZ's interlocutory application.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky.

Associate:

Dated: 11 December 2023