

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Provide Nominees Pty Ltd [2023] FCA 1137

File number(s): VID 712 of 2022

Judgment of: **O'BRYAN J**

Date of judgment: 25 September 2023

Catchwords: **CORPORATIONS** – application made by the Australian Securities and Investments Commission (ASIC) under s 70(3) of the *Australian Securities and Investments Act 2001* (Cth) (ASIC Act) – alleged failure to comply with notice issued pursuant to s 33(1) of the ASIC Act – whether ASIC has fulfilled the precondition in s 70(2) of the ASIC Act requiring ASIC to certify in writing the failure to comply – whether the Court has jurisdiction to hear and determine the application – whether ASIC has shown that there has been a failure by the defendant to comply with the notice without reasonable excuse – whether the Court has power to make an order requiring the making of an affidavit regarding compliance with the notice – order for compliance made

STATUTORY INTERPRETATION – meaning of the phrases “by writing certify” and “failure to comply” in s 70(2) of the Act – scope of power conferred on the Court by s 70(3) to make orders for, and relating to, compliance with a requirement made under Pt 3 of the ASIC Act

Legislation: *Acts Interpretation Act 1901* (Cth), ss 25, 25C
Australian Securities and Investments Commission Act 2001 (Cth), ss 5(2)(b), Pt 2, ss 12DA, 12DB, 12DF, Subdiv G, Div 2, 12GJ, Pt 3, ss 13, 33, Div 7, ss 63(1), 63(5), 70(1), 70(2), 70(3),
Corporations Act 2001 (Cth), ss 9, 86, 588FF(1), 1041E, 1041F, 1041H, 1337B
Privacy Act 1988 (Cth)

Cases cited: *Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority* [2017] VSC 573
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2018) 262 CLR 157
Australian Securities and Investment Commission v Maxi

EFX Global AU Pty Ltd [2020] FCA 1263; 148 ACSR 123
Australian Securities and Investments Commission v Ignite Financial Systems & Research Pty Ltd [2011] FCA 1101
Australian Securities and Investments Commission v Pappas [2006] FCA 1785
Australian Securities Commission v Kutzner (1997) 25 ACSR 723
Australian Securities Commission v Zarro (1991) 32 FCR 546
Bray v F Hoffman-La Roche Ltd (2002) 118 FCR 1
Civil Air Operations Officers Association of Australia v Airservices Australia [2020] FCA 1665
Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Limited (1911) 12 CLR 398
Fenton v Hampton (1858) 11 Moo PCC 347; 14 ER 727
Grant Samuel Corporate Finance Pty Ltd v Fletcher (2015) 254 CLR 477
Grassby v The Queen (1989) 168 CLR 1
Hazeldell Limited v The Commonwealth (1924) 34 CLR 442
Insurance and Superannuation Commissioner v Glaser (1997) 79 FCR 505
Khatri v Price (1999) 95 FCR 287
MacDonald v Australia Securities Commission (No 2) (1994) 48 FCR 210
Maxi EFX Global AU Pty Ltd v Australian Securities and Investments Commission (2021) 284 FCR 643
Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3) (1980) 31 ALR 519
Old UGC Inc v Industrial Relations Commission of New South Wales (2006) 225 CLR 274
Parsons v Martin (1984) 5 FCR 235
Pelechowski v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435
SunshineLoans Pty Ltd v Australian Securities and Investments Commission [2023] FCA 707
Thomson Australian Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150
Transport Workers Union (NSW) v Australian Industrial Relations Commission (2008) 166 FCR 108
Trolly, Draymen and Carters Union of Sydney and Suburbs v Master Carriers Association (NSW) (1905) 2 CLR 509
Zhang v Zemin (2010) 79 NSWLR 513

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 146

Date of hearing: 23 June 2023

Counsel for the Plaintiff: P Collinson KC with L Hogan

Solicitor for the Plaintiff: Australian Government Solicitor

Counsel for the Defendant: M D Wyles KC with D Luxton and O Nanlohy

Solicitor for the Defendant: Strongman & Crouch

ORDERS

VID 712 of 2022

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Plaintiff

AND: **PROVIDE NOMINEES PTY LTD (ACN 644 657 161)**
Defendant

ORDER MADE BY: **O'BRYAN J**

DATE OF ORDER: **25 SEPTEMBER 2023**

THE COURT ORDERS THAT:

1. Within 28 days of the date of this order, the Defendant comply with the notice dated 28 September 2022 issued by the Plaintiff to the Defendant pursuant to s 33(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**Notice**) by producing to the Plaintiff, in unredacted form, all books in its possession, custody or control described in paragraphs 1, 2, 3 and 12 of the schedule to the Notice not otherwise produced to the Plaintiff, including an unredacted copy of each document previously produced in redacted form.
2. On the question of the costs of the proceeding:
 - (a) on or before 2 October 2023, the Plaintiff file and serve any affidavit and an outline of submissions of no more than 3 pages;
 - (b) on or before 9 October 2023, the Defendant file and serve any affidavit and an outline of submissions of no more than 3 pages; and
 - (c) the question will be determined by the Court on the papers.

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

REASONS FOR JUDGMENT

O'BRYAN J:

Introduction

1 By originating process dated 2 December 2022, the plaintiff (**ASIC**) seeks an inquiry by the Court pursuant to s 70(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) into the compliance by the defendant (**Provide**) with a notice dated 28 September 2022 given by ASIC under s 33 of the ASIC Act (**Notice**) requiring Provide to produce certain books as specified in 15 categories of documents enumerated in the schedule to the Notice. ASIC also seeks an order pursuant to s 70(3) that Provide produce to ASIC, on a date to be determined by the Court, all books described in the Notice, and an order for payment of its costs.

2 The Notice was issued in the course of an investigation of Provide that ASIC has undertaken since 29 March 2022 pursuant to s 13 of the ASIC Act. Broadly, the investigation concerns suspected contraventions of the *Corporations Act 2001* (Cth) (**Corporations Act**) and the ASIC Act in connection with the offering by Provide of investment opportunities to members of the public in the period from 26 September 2020.

3 Section 70 of the ASIC Act concerns the powers of the Court where a person has failed to comply with a requirement made under Pt 3 of the ASIC Act, which relevantly includes failures to comply with notices given under s 33 of the ASIC Act to produce specified books. Section 70 states as follows:

Powers of Court where non-compliance with Part

- (1) This section applies where ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Part (other than Division 8).
- (2) ASIC may by writing certify the failure to the Court.
- (3) If ASIC does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

4 On the application, ASIC contends that Provide has failed to comply with the Notice in two principal ways: first, Provide has failed to produce all documents within its possession, custody or control that respond to certain categories of documents specified in the schedule to the Notice; second, Provide has produced redacted copies of certain documents in response to the Notice without being entitled to so redact.

5 As noted, by its originating process, ASIC sought an order that Provide produce to ASIC all books described in the Notice. At the hearing of the application, ASIC both narrowed and expanded the orders it sought. First, ASIC narrowed the order for production to require Provide to comply with the Notice by producing, in unredacted form, all books in its possession described in categories 1, 2, 3 and 12 of the schedule to the Notice that had not otherwise been produced to ASIC (including unredacted copies of documents previously produced in redacted form). Second, ASIC sought an additional order, that had not been sought in the originating process, requiring Provide to file and serve an affidavit made by a director or authorised officer identifying the books produced in compliance with the Court’s order, stating the searches undertaken by or on behalf of Provide for books in its possession referred to in the Court’s order, and certifying that Provide has no unproduced books in its possession as described in the Court’s order. A question arises as to the power of the Court to make the additional order sought by ASIC.

6 In support of its application, ASIC relied on the following materials:

- (a) four affidavits of Shannon James McGuire, an Investigator in the Financial Services Enforcement team of the Office of Enforcement in the Melbourne office of ASIC, sworn 2 December 2022, 6 April 2023 (with the exception of certain paragraphs which were not read), 26 May 2023 (with the exception of certain paragraphs which were not read) and 23 June 2023;
- (b) an affidavit of Alison Zoe Smith, an Investigator in the Financial Services Enforcement team of the Office of Enforcement in the Melbourne office of ASIC, sworn 9 February 2023;
- (c) an outline of written submissions on the question of compliance dated 14 April 2023; and
- (d) an outline of written submissions on the question of the Court’s jurisdiction to hear and determine the application dated 26 May 2023.

7 Provide denies that it has failed to comply with the Notice. At the hearing, however, Provide elected to contest ASIC’s application on one basis only: that the Court does not have jurisdiction to hear and determine the application by reason of ASIC’s failure to satisfy the requirement contained in s 70(2) of the ASIC Act. Prior to the hearing, Provide requested the Court to hear and determine this issue of jurisdiction separately to and before the issue of Provide’s compliance with the Notice. I refused to do so and Provide was notified that all issues

would be determined at the hearing. At the hearing, Provide chose not to adduce any evidence or advance any submissions on the issue of its compliance with the Notice. In support of its contentions concerning the Court’s jurisdiction, Provide relied on its written submissions dated 28 April 2023 and oral arguments advanced at the hearing.

8 There are three principal questions for determination:

- (a) first, does the Court have jurisdiction to conduct an inquiry and make orders under s 70(3) of the ASIC Act;
- (b) second, if the answer to the first question is yes, did Provide fail to comply, without reasonable excuse, with the Notice given under s 33 of the ASIC Act; and
- (c) third, if the answer to the second question is yes, what orders should be made in respect of that non-compliance?

9 For the reasons that follow, I reject the arguments advanced by Provide with respect to jurisdiction. I am also satisfied that an order requiring Provide to produce documents in accordance with categories 1, 2, 3 and 12 of the schedule to the Notice should be made and that Provide should be ordered to pay ASIC’s costs of this proceeding.

The question of jurisdiction

Commencement and progress of the proceeding

10 This proceeding was commenced by the filing of an originating process dated 2 December 2022 which was supported by Mr McGuire’s affidavit dated 2 December 2022.

11 In his affidavit of 2 December 2022, Mr McGuire deposed that, having reviewed the material produced by Provide on 25 November 2022 and 1 December 2022 in response to the Notice, he identified that Provide had produced no documents in response to categories 1, 2, 3, 7(d), 12, 13 or 14 of the schedule to the Notice. Mr McGuire further deposed that:

ASIC is ... satisfied that Provide Capital has, without reasonable excuse, failed to comply with the requirements in the Third Notice.

12 Mr McGuire also deposed that he had signed a certificate on 2 December 2022 pursuant to s 70(2) of the ASIC Act. The certificate, which was annexed to his affidavit, stated as follows:

I, **SHANNON JAMES McGUIRE**, am employed by the Australian Securities & Investments Commission (“ASIC”) as an Investigator in the Financial Services Enforcement Team in Melbourne.

I certify that Provide Nominees Pty Ltd ACN 644 657 161 (**the Company**) failed to

produce books in relation to an investigation under section 13 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**the ASIC Act**) into suspected contravention of sections 911A, 1041E, 1041F and 1041H of the *Corporations Act 2001* (Cth) and sections 12DA, 12DB and 12DF of the ASIC Act by the Company in connection with the offering of investment opportunities in the period from 26 September 2020 and ongoing, to me by 4:00pm on Tuesday 11 October 2022 at Level 7, 120 Collins Street, Melbourne, Victoria, via email to shannon.mcguire@asic.gov.au, pursuant to a Notice Requiring the Production of Books issued under section 33 of the ASIC Act, dated 28 September 2022, and served by email on Andrew Green of SBA Law at the email address agreen@sbalaw.com by me at 12:31 pm on 28 September 2022.

- 13 In his second affidavit dated 6 April 2023 (as corrected by his fourth affidavit dated 23 June 2023), Mr McGuire confirmed that he personally had formed the view on behalf of ASIC that Provide had, without reasonable excuse, failed to comply with the requirements in the Notice.
- 14 On 1 February 2023, I made orders by consent for the timetabling of this matter to hearing, including in relation to the filing of evidence and submissions. On 16 March 2023, the matter was listed for hearing on 23 June 2023. Between 1 February 2023 and 20 April 2023, both parties filed evidence regarding Provide's compliance with the Notice.
- 15 On 20 April 2023, Provide's solicitors, Strongman & Crouch, sent an email to my chambers stating that Provide intended to contest the Court's jurisdiction to hear and determine ASIC's application, and seeking a variation to the timetable with the effect that the question of jurisdiction would be heard and determined separately to, and before, any other issue in the proceeding. The question of the Court's jurisdiction had not been raised by any party before this time. ASIC did not consent to the course proposed by Provide.
- 16 On 1 May 2023, my chambers responded to Strongman & Crouch informing them that:
- (a) the form of communication sent by Strongman & Crouch to chambers went beyond what is appropriate to be communicated to chambers, viz communications that are uncontroversial or otherwise agreed between the parties (as stated in section 15 of the Court's Central Practice Note);
 - (b) the Court would not deal with applications to vary extant orders that were made by way of email sent to chambers, unless the variation was by consent; and
 - (c) if Provide wished to apply to vary the extant orders, it should do so by filing an application supported by appropriate material explaining the reasons for any non-compliance with orders to date and why any future order, such as the order listing the matter for hearing, should be varied.

17 No application was filed by Provide, although Provide subsequently informed ASIC and the Court by email that it intended to pursue only the jurisdictional issue at the hearing on 23 June 2023.

18 By his affidavit sworn 26 May 2023, Mr McGuire deposed that he had signed a further certificate on that date pursuant to s 70(2) of the ASIC Act. The certificate, which was annexed to that affidavit, stated as follows:

I, **SHANNON JAMES McGUIRE**, am employed by the Australian Securities & Investments Commission (**ASIC**) as an Investigator in the Financial Services Enforcement Team in Melbourne. Pursuant to s 102 of the *Australian Securities and Investments Commission Act 2001* (Cth) (**the ASIC Act**), ASIC has delegated to me certain functions and powers under Part 3 of the ASIC Act related to the conduct of investigations.

In relation to an investigation under section 13 of the ASIC Act into suspected contravention of sections 911A, 1041E, 1041F and 1041H of the *Corporations Act 2001* (Cth) and sections 12DA, 12DB and 12DF of the ASIC Act, I issued a notice dated 28 September 2022 (NTC2215653) (**Notice**) under section 33 of the ASIC Act to Provide Nominees Pty Ltd ACN 644 657 161 (**the Company**) requiring the production of specified books to me by 4pm on 11 October 2022, at Level 7, 120 Collins Street, Melbourne, Victoria, via email to shannon.mcguire@asic.gov.au.

I am satisfied and I certify that the Company has, without reasonable excuse, failed to comply with a requirement made under s 33(1) of the ASIC Act, for the production of specified books pursuant to the Notice, by failing to produce:

- books specified in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15 of the Schedule to the Notice at the place and time specified in the Notice; and
- certain books specified by paragraphs 2 and 3 of the Schedule to the Notice; and
- unredacted forms of certain books produced (in redacted form) by the Company in response to the Notice, where the Company had no valid entitlement to apply or maintain redactions on their production.

19 The hearing proceeded on 23 June 2023. As stated earlier, Provide's only submission at the hearing was that the Court did not have jurisdiction to hear the application. Provide otherwise chose to adduce no evidence and to make no submissions with respect to its compliance with the Notice.

Contentions of Provide

20 Provide's principal contention was that, before commencing this proceeding, ASIC had failed to certify the matters that it was required to certify under s 70(2) of the ASIC Act, and therefore the jurisdiction of the Court to inquire into Provide's conduct had not been enlivened.

21 Provide submitted that, by s 19 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), the Court has such original jurisdiction as is vested in it by laws made by the Commonwealth Parliament. Provide argued that the Court’s jurisdiction in the present case was conferred by s 70(3) of the ASIC Act. Under s 70(3), the Court’s jurisdiction was only conferred if ASIC gave written certification in accordance with s 70(2). In support of its submission, Provide relied on the following statement of Hill J in *MacDonald v Australia Securities Commission (No 2)* (1994) 48 FCR 210 (at 220):

It will be observed that the satisfaction of the Commission brings s 70 into operation and authorises the Commission to proceed with the certification of failure to comply which in turn gives the Court jurisdiction to inquire into the case and make an order requiring compliance with the notices.

22 Provide submitted that, properly construed, s 70(2) requires ASIC to certify each of the elements referred to in 70(1): that ASIC is satisfied that a person has failed to comply with a requirement made under Pt 3 of the ASIC Act and that the failure is without reasonable excuse. Provide submitted that the first certificate issued by ASIC on 2 December 2022 (immediately before the commencement of the proceeding) only certified that Provide had failed to produce books pursuant to the Notice. The certificate did not certify that the failure was without reasonable excuse.

23 In support of its preferred construction, Provide placed primary reliance on contextual arguments. First, it argued that the use of the word “certify” in s 70(2) is significant. The word “certify” is defined in the Oxford English Dictionary to include: “To make (a thing) certain; to guarantee as certain; attest in an authoritative manner; to give certain information of; to declare or attest by a formal legal certificate; to make certification”. The requirement to “certify” can be contrasted with more general terms such as “confirm”, “notify” or “depose”. Second, Provide argued that, when read in the context of Pt 3 of the ASIC Act, it is apparent that s 70(2) prescribes a requirement of substantive significance. Part 3 of the ASIC Act makes provision for ASIC to have extensive investigative powers and functions. Section 70 provides a mechanism by which ASIC may “co-opt” the Court’s process for the purposes of its investigative powers and functions. Where a person does not comply with an order made under s 70(3) of the ASIC Act, the person is liable to prosecution for contempt of Court: *Australian Securities and Investments Commission v Pappas* [2006] FCA 1785 at [2] per Emmett J.

24 Provide further submitted that the cases show that ASIC’s practice has been to certify that it is satisfied of both the failure to comply and the absence of a reasonable excuse, referring to

Australian Securities and Investment Commission v Maxi EFX Global AU Pty Ltd [2020] FCA 1263; 148 ACSR 123 (*ASIC v Maxi EFX*) at [77] per Wigney J, *Australian Securities and Investments Commission v Pappas* [2006] FCA 1785 at [6] per Emmett J, and *Australian Securities and Investments Commission v Ignite Financial Systems & Research Pty Ltd* [2011] FCA 1101 at [27] per Greenwood J.

25 Provide submitted that ASIC’s failure to certify the matters in s 70(1) cannot be cured by reliance either on the second certificate dated 26 May 2023 (which, as set out above, states Mr McGuire’s satisfaction as to Provide’s failure to comply with the Notice and the absence of any reasonable excuse for that failure), or on the affidavit sworn by Mr McGuire on 6 April 2023 (which, as set out above, was to the effect that Mr McGuire had formed the view on behalf of ASIC that Provide had, without reasonable excuse, failed to comply with the requirements in the Notice). Provide argued that the inquiry to which s 70(3) refers begins from the time the proceeding is commenced, and the Court must have jurisdiction at that time.

26 Finally, Provide also submitted that the issue of jurisdiction should be determined as a preliminary matter. Provide argued that this approach is consistent with that adopted in the “usual case”, citing *Zhang v Zemin* (2010) 79 NSWLR 513 at [33] per Spigelman CJ, with Allsop P, as his Honour then was, and McClellan CJ at CL agreeing. Provide also submitted that this is consistent with the principle that the first duty of a court or tribunal is to satisfy itself that it has jurisdiction to hear a proceeding, citing *Old UGC Inc v Industrial Relations Commission of New South Wales* (2006) 225 CLR 274 at [51] per Kirby J; *Hazeldell Limited v The Commonwealth* (1924) 34 CLR 442 at 446 per Isaacs ACJ; *Federated Engine-Drivers and Firemen’s Association of Australasia v Broken Hill Proprietary Co Limited* (1911) 12 CLR 398 at 415 per Griffith CJ.

Contentions of ASIC

27 On the question of jurisdiction, ASIC’s primary submission was that s 70(2) only requires ASIC to certify that there has been a failure to comply with a requirement made under Pt 3 of the ASIC Act. It does not require ASIC to certify that there is no reasonable excuse for that failure. ASIC’s first certificate therefore fulfilled that requirement. In the alternative, and assuming that s 70(2) requires ASIC to certify the absence of reasonable excuse, ASIC submitted that Mr McGuire’s evidence in his affidavit dated 2 December 2022 together with ASIC’s certificate dated 2 December 2022 or, alternatively, ASIC’s second certificate dated 26

May 2023, were sufficient to engage the Court’s jurisdiction to conduct an inquiry under s 70(3) of the ASIC Act.

28 As to its primary submission, ASIC observed that s 70(1) requires ASIC to be satisfied of two matters for it to be empowered to make a certification pursuant to s 70(2): that a person has failed to comply with a requirement made under Pt 3 of the ASIC Act and that the person is without reasonable excuse for the failure. On its terms, s 70(2) contemplates certification to the Court only of “the failure”, which should be construed as the failure to comply with a requirement made under Pt 3 of the ASIC Act. Section 70(2) does not require certification of ASIC’s state of satisfaction (including ASIC’s satisfaction of the absence of reasonable excuse). Properly understood, the section is addressed to certification *upon* a precondition, not certification *of* a precondition. The Court’s jurisdiction to inquire into the case pursuant to s 70(3) is engaged by the certification made under s 70(2), not ASIC’s satisfaction under s 70(1).

29 ASIC submitted that its construction of s 70 is supported by the statutory context. Within Pt 3 of the ASIC Act, the failure to comply with a statutory requirement, and the existence and characterisation of any excuse for that failure, are treated as distinct concepts. In that regard, ASIC observed that the note to s 33(1) of the ASIC Act, which empowers ASIC to issue a notice for the production of specified books, states that failure to comply with a requirement under that section is an offence and does not otherwise refer to a “reasonable excuse”. Section 63(1) of the ASIC Act creates an offence where a person intentionally or recklessly fails to comply with a requirement under s 33 (among other provisions). Section 63(5) provides that s 63(1) does not apply to the extent that a person has a reasonable excuse. The note to that section provides that a defendant bears an evidential burden in relation to any reasonable excuse. Further, in the context of a s 70(3) inquiry, the defendant must prove the existence and reasonableness of an excuse: *ASIC v Maxi EFX* at [81], [129]. ASIC also submitted that there is a difference between ASIC’s satisfaction as to the absence of a reasonable excuse and an objective finding by the Court as to the existence of a reasonable excuse. ASIC argued that Provide’s construction of s 70(2) would require ASIC to certify to the Court a matter, being the absence of any reasonable excuse, that ASIC is itself not required to prove or disprove in the context of an inquiry under s 70(3).

30 In relation to Provide’s contention that ASIC’s usual practice regarding certification under s 70(2) of the ASIC Act is to certify both the relevant failure to comply and the absence of a reasonable excuse, ASIC submitted that the authorities relied on by Provide do not assist. In

two of those authorities, the form of the certification was not expressly identified and, in the third, it was not in issue such that the Court made no determination as to what s 70(2) requires.

31 As to ASIC's alternative submission, ASIC argued that, if it was required to certify both Provide's failure to comply and the absence of a reasonable excuse, then it did so by means of the certificate dated 2 December 2022 and the statement made by Mr McGuire in his affidavit of the same date to the effect that ASIC was satisfied that Provide had, without reasonable excuse, failed to comply with the requirements in the Notice. ASIC argued that s 70(2) does not require certification to be made in a particular form or instrument, or in any single document. Having regard to ss 25 and 25C of the *Acts Interpretation Act 1901* (Cth), which applies to the ASIC Act, the power to certify contained in s 70(2) allows for certification by any mode of representation or reproduction of words in a visible form, and even if the Act were to prescribe a particular form, substantial compliance with it would suffice. Further or alternatively, the certificate signed by Mr McGuire on 26 May 2023, which certifies both Provide's failure to comply and the absence of any reasonable excuse, engages the Court's authority to decide matters under s 70(3). ASIC submitted that the certification need only occur prior to the Court inquiring into the case which, here, occurred at the hearing on 23 June 2023.

Consideration

Refusal to hear the jurisdictional question as a preliminary issue

32 As noted above, Provide made an informal request for the Court to hear and determine its objection to jurisdiction as a preliminary issue. I refused that informal request. No formal application was subsequently made by Provide to have the issue determined as a preliminary issue. Nevertheless, Provide appeared to maintain a submission that the Court should adopt that course. To the extent it is relevant, these are my reasons for proceeding to hear the whole of the application.

33 It is well-established that the Court has a discretion to determine the time at which, and the manner in which, a jurisdictional issue is to be heard and determined: see *Khatri v Price* (1999) 95 FCR 287 (*Khatri*) at [14] per Katz J, which has been followed in many cases including *Bray v F Hoffman-La Roche Ltd* (2002) 118 FCR 1 at [185]-[187] per Merkel J, *Civil Air Operations Officers Association of Australia v Airservices Australia* [2020] FCA 1665 at [31] per Murphy J and *SunshineLoans Pty Ltd v Australian Securities and Investments Commission* [2023] FCA 707 at [61]-[62] per Yates J. Although the first duty of the Court is to satisfy itself that it has jurisdiction to hear and determine a matter before it, that duty does not require the Court to

determine any dispute concerning jurisdiction as a preliminary issue. As Katz J observed in *Khatri* at [14]:

Because any Australian court is a court of limited jurisdiction, its “first duty”, when there has been a purported invocation of its jurisdiction, is to satisfy itself that it has the jurisdiction purportedly invoked: *Federated Engine-Drivers and Firemen’s Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 at 415 (Griffith CJ). (In making his well-known statement, Griffith CJ gave, as a reason for the existence of such a “first” duty, “if only to avoid putting the parties to unnecessary risk and expense”. That reason appears to imply that the duty is one which must be fulfilled “first” in the sense that the court concerned must determine the question of its jurisdiction before hearing any evidence or argument on issues which would arise in the proceeding if it did have the jurisdiction purportedly invoked. However, in spite of that reason’s having been given by Griffith CJ, the duty has not been generally understood to be “first” in that sense. The duty has been generally understood instead as permitting the court concerned to exercise a discretion (subject, obviously (if the court is not the High Court), to appellate or supervisory review, whichever is appropriate) to postpone determining the question of its jurisdiction until after it has heard the whole case, provided, however, that having done so, it then “first” determines that question. ...

34 I was, and remain, satisfied that it is appropriate for the question of jurisdiction in the present proceeding to be heard and determined together with all substantive issues requiring determination. The issue of jurisdiction was raised for the first time approximately two months’ away from the hearing of ASIC’s application, after the parties’ primary evidence on the substantive issues in the proceeding had been filed, and at a time when submissions on those issues were due in a matter of days. Moreover, Provide’s request was made without any formal application for the question of jurisdiction to be heard separately as a preliminary matter, and ASIC did not consent to that course. I considered that the additional time and expense of dealing with both jurisdictional and substantive issues together would be minimal, having regard to the advanced state of the parties’ preparation in respect of the hearing of the substantive issues and the limited scope of ASIC’s application.

Does compliance with s 70(2) raise an issue of jurisdiction?

35 The premise for Provide’s contentions is that compliance with s 70(2) by ASIC is a precondition to the Court’s jurisdiction to inquire into the case and make orders under s 70(3). ASIC did not challenge that characterisation of s 70(2). In those circumstances, I have proceeded on that basis that the premise is correct. In that regard, I note that the High Court has characterised a statutory precondition with respect to the time period in which applications under s 588FF(1) of the Corporations Act may be made as jurisdictional in nature: see *Grant Samuel Corporate Finance Pty Ltd v Fletcher* (2015) 254 CLR 477 at [22].

36 I also proceed on the basis that the above premise is not affected by s 1337B of the Corporations Act or s 12GJ of the ASIC Act, both of which confer jurisdiction on this Court in respect of matters arising under the ASIC Act.

37 Section 1337B of the Corporations Act states that:

- (1) Jurisdiction is conferred on the Federal Court of Australia with respect to civil matters arising under the Corporations legislation.

38 The expression “Corporations legislation” is defined in the Corporations Act to include the ASIC Act.

39 Section 12GJ of the ASIC Act (which appears in Subdiv G of Div 2 of Pt 2) relevantly states that:

- (1) Jurisdiction is conferred on the Federal Court in any matter:
 - (a) ...; or
 - (b) arising under Part 3 in its application in relation to an investigation of a contravention of this Division;in respect of which a civil proceeding may be instituted under this Subdivision or under Part 3 as so applying.

40 ASIC’s investigation in the present matter included suspected contraventions of ss 12DA, 12DB and 12DF of the ASIC Act, which appear in Div 2 of Pt 2 of the ASIC Act.

41 While each of s 1337B of the Corporations Act and s 12GJ of the ASIC Act confer general jurisdiction on this Court with respect to matters arising under Pt 3 of the ASIC Act, they cannot be construed so as to override the express precondition to the Court’s jurisdiction to conduct an inquiry under s 70(3) which is stated in s 70(2). There is no doubt, however, that this Court has jurisdiction to determine the controversy between the parties as to whether ASIC made a certification to the Court in accordance with s 70(2), thereby enlivening the Court’s jurisdiction to inquire into the case and make orders under s 70(3).

The proper construction of s 70(2)

42 Division 7 of Pt 3 of the ASIC Act is titled “Offences”. Broadly, Div 7 proscribes as an offence the failure to comply with a requirement made by ASIC pursuant to its powers of investigation and information gathering under Pt 3 of the ASIC Act, as well as other forms of conduct that would obstruct an ASIC investigation. Division 7 also specifies defences to the proscriptions. Section 70 stands apart from the other provisions of Div 7 and can be described as *sui generis*.

Section 70 empowers the Court to conduct an inquiry into non-compliance with a requirement made under Pt 3 and to order compliance.

43 Section 70 contemplates three distinct steps before the Court can exercise power to make orders:

- (a) first, ASIC must reach a state of satisfaction that a person has, without reasonable excuse, failed to comply with a requirement made under Pt 3 (other than Div 8) (s 70(1));
- (b) second, ASIC may by writing certify the failure to the Court (s 70(2)); and
- (c) third, if ASIC does so, the Court may inquire into the case (s 70(3)).

44 It is common ground between the parties that s 70(2) operates as a precondition to the Court conducting an inquiry under s 70(3). The dispute concerns the meaning of s 70(2).

45 Section 70(2) refers to ASIC, by writing, certifying to the Court “the failure”. It is tolerably clear that the certification is not of ASIC’s state of satisfaction; specifically, s 70(2) does not state that ASIC may certify that it is satisfied of the matters referred to in s 70(1). The section states that ASIC may certify “the failure”.

46 The expression “the failure” in s 70(1) involves the use of a shorthand reference. In context, it is clear that the shorthand reference is to “the failure” that is referred to in s 70(1). It is less clear, though, whether the shorthand reference is to the failure of the relevant person to comply with the relevant requirement made under Pt 3, or whether it is a reference to the failure to do so without reasonable excuse. There is nothing in the text of s 70(2) which resolves that ambiguity.

47 Although the question is not free from doubt, I consider that the better view is that the expression “the failure” in s 70(2) is intended to be a reference to the failure of the relevant person to comply with the relevant requirement made under Pt 3 without reasonable excuse. That construction conforms with the apparent purpose of each limb of s 70.

48 As already noted, s 70 empowers the Court to conduct an inquiry into non-compliance with a requirement made under Pt 3 and order compliance. Section 70(1) states a precondition to the application of the section – ASIC must be satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under Pt 3 (other than Div 8). Section 70(2) states a precondition to the Court conducting an inquiry – ASIC by writing certifies the failure

to the Court. The apparent purpose of the second limb in s 70(2) is to certify to the Court the matter about which ASIC must be satisfied – that a person has, without reasonable excuse, failed to comply with a requirement made under Pt 3 (other than Div 8). The certification of that matter performs two functions. First, by receiving the certification from ASIC, the Court is informed that ASIC believes that the matters that are the subject of the certification exist. In that way, the Court is able to confirm that the precondition in s 70(1) is fulfilled and the section applies. Second, the certification defines the subject and scope of the inquiry which is then to be conducted by the Court.

49 In my view, the contextual matters raised by ASIC do not compel a different conclusion. It can be accepted that a failure to comply with a requirement made under Pt 3 of the ASIC Act, and the reasonableness of any excuse for non-compliance, are discrete issues. In a proceeding under either s 63 or s 70, ASIC bears the burden of proving non-compliance whereas the defendant bears the burden of proving reasonable excuse: see s 63(5) and, in respect of s 70, *ASIC v Maxi EFX* at [81], [129]. However, that factor does not bear upon the proper construction of s 70(2). The certification made by ASIC does not itself constitute evidence of either non-compliance or absence of reasonable excuse. Certification is a procedural step which enlivens the Court’s jurisdiction to conduct the inquiry. As already noted, the function of certification is to inform the Court that ASIC believes the matters stated in s 70(1) to exist and to define the subject and scope of the Court’s inquiry.

50 I note for completeness that, in reaching the above view about the construction of s 70(2), I have placed no weight on Provide’s submission concerning ASIC’s past “practice” with respect to certification or the three authorities cited by Provide in support of that submission. ASIC’s past practice cannot bear upon the proper construction of the statute and the authorities relied upon by Provide do not address the issue now raised.

Has ASIC made a certification in accordance with s 70(2)?

51 Contrary to Provide’s contention, in my view ASIC has made a certification in the present proceeding that satisfies the requirement in s 70(2).

52 The certification occurred on 2 December 2022 immediately prior to the commencement of the proceeding. It can be accepted that the certificate issued by Mr McGuire on 2 December 2022 did not itself fully satisfy the requirement in s 70(2). By that certificate, Mr McGuire certified that Provide had failed to produce books pursuant to the Notice (which had been issued by ASIC under s 33 of the ASIC Act on 28 September 2022). The certificate did not, though,

certify that the failure was without reasonable excuse. However, on the same day as signing the certificate, Mr McGuire swore an affidavit in which he deposed that ASIC was satisfied that Provide had, without reasonable excuse, failed to comply with the requirements of the Notice.

53 I do not accept Provide’s contention that Mr McGuire’s affidavit cannot constitute a certification for the purposes of s 70(2). As Provide acknowledged, the word “certify” is defined in the Oxford English Dictionary to include: “To make (a thing) certain; to guarantee as certain; attest in an authoritative manner; to give certain information of; to declare or attest by a formal legal certificate; to make certification”. The meanings given by the Macquarie Dictionary are similar and include: “to guarantee as certain; give reliable information of”, “to testify to or vouch for in writing”, “to assure or inform with certainty”, “to guarantee; endorse reliably”, and “to give assurance; testify; vouch”. Section 70(2) does not prescribe any particular form of certification. I can see no reason why a statement on oath in an affidavit cannot constitute written certification for the purposes of s 70(2). That conclusion is reinforced by the fact that s 70(2) requires ASIC to certify the failure to the Court. The certification is not directed to the person who has failed to comply with the relevant requirement made under Pt 3. The certification is directed to the Court. In my view, certification provided by way of an affidavit filed with the Court is an entirely appropriate form of certification for the purposes of s 70(2).

54 Given that conclusion, it is unnecessary to determine whether the second certificate signed by Mr McGuire on 26 May 2022 also satisfied the requirement in s 70(2) to enable the Court to conduct the inquiry under s 70(3). Against the possibility that the case may go further, I will briefly state my reasons for concluding that the second certificate also satisfied s 70(2).

55 By the second certificate, Mr McGuire certified that Provide had, without reasonable excuse, failed to comply with a requirement made under s 33(1) of the ASIC Act. Provide argued that the second certificate could not be relied upon by ASIC to enliven the Court’s jurisdiction to conduct the inquiry under s 70(3) because the inquiry had already commenced. Provide’s argument appeared to go so far as to say that a certification under s 70(2) must pre-date the commencement of proceedings in the Court under s 70(3). However, the gist of the submission appeared to be that interlocutory steps taken in the proceeding, such as the filing of evidence and submissions, also constituted part of the inquiry. Provide submitted that, in so far as those steps had been taken before the second certificate was given by ASIC, the steps (and perhaps

the institution of the proceeding) were a nullity because they had been undertaken in the absence of jurisdiction.

56 It can be accepted that the certification required by s 70(2) must pre-date any inquiry undertaken by the Court under s 70(3) because the section specifies that the Court may undertake an inquiry if (and, implicitly, only if) ASIC has by writing certified the failure to the Court. Contrary to Provide's submission, however, the Court's inquiry under s 70(3) does not begin with the commencement of the proceeding by the filing of an originating process. Further, it is implicit in the language of s 70(2), which states that ASIC "may certify the failure to the Court", that ASIC's certification will occur in the proceeding that is commenced under s 70(3). Until the proceeding is commenced, it is not possible for ASIC to certify the failure to the Court. Ordinarily, it would be expected that the certification is given in the supporting affidavit that accompanies the originating process at the commencement of the proceeding. That occurred in the present case. A failure to do so, however, would not nullify the proceeding. It would only mean that the Court is not empowered to conduct the inquiry unless and until certification had been given in accordance with s 70(2). I can see no reason why ASIC is unable to make the certification after the commencement of the proceeding. There is nothing in the language of s 70 which suggests otherwise. The certification required by s 70(2) is not subject to any time prescription. Rather, the effect of s 70(3) is that the Court cannot undertake the inquiry into the case until the certification has been given by ASIC.

57 In the present case, the Court made timetabling orders for the filing of evidence and submissions, and the parties filed evidence and submissions, before any challenge was made to the Court's jurisdiction to conduct the inquiry. Indeed, whilst Provide sent an email to chambers stating that it intended to challenge the Court's jurisdiction, at no time did it file an application seeking orders to set aside the timetabling orders made by the Court. The ordinary meaning of the phrase "inquire into the case" is to conduct a hearing into the relevant issue, which is whether the relevant person has, without reasonable excuse, failed to comply with a requirement made under Pt 3. That hearing occurred on 23 June 2023. It may be that procedural steps such as the filing of evidence and submissions prior to the hearing also form part of the inquiry and, in a given case, a defendant may challenge the making of such orders on the basis that the precondition in s 70(2) has not been fulfilled and the Court has no jurisdiction to make those orders. An application might also be made for such orders to be set aside for want of jurisdiction and for other consequential orders such as the uplifting of documents that had been filed. However, in the present case, no such challenge or application was made by Provide.

Provide submitted that the hearing should not proceed for want of jurisdiction. Provide did not otherwise seek to contest ASIC's allegations and did not adduce any evidence or advance any submissions in response to ASIC's allegations. Nor did the ASIC seek to place any reliance on the material that had been filed by Provide in accordance with the timetabling orders.

58 Having regard to those circumstances, I consider that the Court's jurisdiction to conduct the hearing on 23 June 2023 was also supported by the second certificate given by Mr McGuire.

59 For the foregoing reasons, I reject Provide's challenge to the jurisdiction of the Court to conduct the inquiry.

Compliance with the Notice

Overview

60 I turn now to the question whether Provide has failed to comply with the terms of the Notice without reasonable excuse.

61 As noted earlier, the scope of ASIC's case narrowed considerably prior to the hearing. At the hearing, ASIC alleged non-compliance only in respect of four categories of books specified in the Schedule to the Notice, being categories 1, 2, 3 and 12. Before addressing each of the disputed categories in turn, it is necessary to state the relevant background facts established by the evidence, summarise the applicable principles governing the obligation to produce books pursuant to a notice given under s 33 of the ASIC Act and governing an inquiry under s 70(3) of the ASIC Act, and also to say something about the Services Agreement entered into between Provide and Online Investments Pty Ltd (**Online Investments**) on 17 March 2022.

Relevant background facts

The business conducted by Provide

62 Provide was registered on 26 September 2020 and conducts business under the business name "Provide Capital". ASIC's records show that, since its incorporation, the company has had a series of persons occupy the position of sole director/secretary:

- (a) Dylan Luke Panetta was director from 26 September 2020 until 14 January 2022 and secretary from 26 September 2020 until 25 August 2021;
- (b) Ebba Lindblom was director and secretary from 10 January 2022 until 5 September 2022;

- (c) David Walker was director and secretary for a short period from 5 September 2022 until 17 October 2022; and
- (d) Henry Chan has been the director and secretary since 28 October 2022.

63 It can be seen that the position of company secretary appears to have been vacant between 25 August 2021 until 10 January 2022. As discussed below, Mr Chan has been director and secretary during ASIC’s investigation of the company.

64 Provide’s website, as at January 2022, invited the public to lend money to Provide for fixed terms at fixed interest rates. The website:

- (a) stated that Provide was established in 2015, is part of an Australian-owned investment group established more than a decade ago, and has significant experience working with over 1,000 investors in this time;
- (b) stated that Provide is a “diversified investment company that actively seeks unique opportunities to expand its portfolio”, has “invested in a number of globally recognised business ventures in industries including software, payments, real estate, business credit and more” and had “over \$250 million invested in a diverse portfolio of opportunities”;
- (c) invited the public to “become a lender” and stated that it provides “the opportunity for individuals, companies, SMSFs and trusts to earn a meaningful fixed interest return by joining our exciting journey as lenders to Provide Capital”;
- (d) stated that lenders could “earn 4.25% - 8.45% p.a. by joining our exclusive Lending Partners Program”;
- (e) included the following statements:

Provide Capital's exclusive Lending Partner Program is available to individuals, self-managed super funds and companies seeking a meaningful fixed interest rate for access to their capital.

By becoming a lender to Provide Capital you can enjoy the benefits of a high yield, fixed term solution ranging from 6-120 months, with the option of interest paid monthly or compounded.

This is a capital-stable, fixed interest opportunity in which principal and interest obligations remain constant for the life of the facility.

Provide Capital offers a Corporate Guarantee for all lenders and a dedicated, Australia-based point of contact who you can call or email during business hours.

- (f) in relation to the “Corporate Guarantee”, the website stated:

In the unlikely event of default by Provide Capital the Guarantor (the provider

of the Corporate Guarantee) is required to step in to make good on all obligations that Provide Capital had to its lender(s).

The Guarantor may take steps to sell and/or refinance its assets to make good on the obligations of Provide Capital to its lenders. This process may (or may not) take time. Default Interest will accrue on any outstanding amounts until those amounts are paid in full.

The Guarantor is supported by substantial tangible assets and is a separate, albeit related company to Provide Capital, with an independent Board of Directors.

Full details of the Corporate Guarantee are provided in our Lending Partner Program brochure.

- (g) stated that lenders enter into a legally binding Facility Agreement with Provide Capital; and
- (h) included “Client Reviews” in the nature of testimonials from individuals identified by their first name and the first letter of their surname, for example:

“I WOULD HAVE NO HESITATION IN REFERRING YOUR COMPANY TO FAMILY, FRIENDS AND ACQUAINTANCES...”

Susan B.

65 The evidence discloses that, on 17 March 2022, Provide entered into an agreement, titled “Services Agreement”, with Online Investments for the provision of certain services by Online Investments to Provide. Mr McGuire deposed that the sole director of Online Investments was James Mawhinney. Through Mr McGuire, ASIC also adduced correspondence between Ms Lindblom of Provide and Mr Mawhinney of Online Investments concerning services provided by Online Investments to Provide pursuant to the Services Agreement, and banking records evidencing payments by Provide to Online Investments totalling \$2.6 million.

66 The recitals to the Services Agreement state as follows (where Provide is defined as the “Company” and Online Investments is defined as the “Contractor”):

A. The Company sources, negotiates and initiates debt finance to fund its investment strategy of providing capital and business growth expertise to clients internationally to create value.

B. The Contractor is in the business of providing strategic and business consultancy services.

C. The Company wishes to appoint the Contractor as its strategic adviser and business consultant to provide the Services on the terms and conditions contained in this Agreement.

67 Although the Services Agreement was executed by the parties on 17 March 2022, its stated commencement date was 10 January 2022.

68 Under the Services Agreement, Provide appointed Online Investments to provide the “Services” to Provide on the terms stated in the agreement. The defined “Services” were set out in Schedule 2 to the Services Agreement in the following terms:

Service Type	Description of service to be provided to the Company
Arrange and maintain a corporate guarantee	Arrange and maintain a corporate guarantee as security for financiers entering into a Facility Agreement with the Company that is capable of supporting principal and interest repayments in the event of default under those agreements.
Business model establishment	Assist with implementation and advise on the Company's business setup, administration, systems, legal, capital management, customer service, client acquisition strategy, collateral, client onboarding, training and recruitment.
Liquidity management model	Establish and maintain a Liquidity Management Model on behalf of the Company for the purposes of managing the liquidity of the Company relative to the tenure of its financiers and assessing available investable capital.
Ongoing advice, coaching and mentoring	Provide ongoing strategic business advice and services aimed at growing funds under management and assets under management.
Bookkeeping, administration and documentation facilitation	Facilitate bookkeeping, tax compliance, a Financier register, and secure storage of client documentation on behalf of the Company.
Referencing Transaction and Sector experience	Allow the Company to refer to transactions that the Contractor (or its officers, if applicable) and its Related Entities and their staff have co-ordinated and investment sectors the Contractor (or its officers, if applicable) and its Related Entities and their staff are experienced in on marketing collateral.
Referencing to clients	Allow the Company to refer to client references obtained by the Contractor (or its officers, if applicable) and its Related Entities in previous or existing businesses operated by the Contractor (or its officers, if applicable) and its Related Entities.
Access to Contractor's employees	Allow the Company access to employees of the Contractor (or its officers, if applicable) and its Related Entities for advice and support from time-to-time subject to reasonable usage.
Introduction to investment opportunities	Introduce the Company to investment opportunities arising from the court-appointment of external administrators to entities that the Contractor (or its officers, if applicable) is

	associated with.
Legal support	Assist with engaging lawyers and obtaining legal advice as and when needed by the Company.

69 Under the Services Agreement, Provide agreed to provide Online Investments with access to Provide’s premises, office facilities, services, materials, personnel and company account credentials (excluding bank account credentials) to perform the Services, in accordance with Provide’s policy from time to time.

70 In consideration of Online Investments providing those services, Provide agreed to pay Online Investments a “Services Fee” of \$25,000 plus GST per month.

Investigation by ASIC

71 Mr McGuire deposed that ASIC commenced its investigation in relation to Provide on 29 March 2022. The investigation initially concerned suspected contraventions of s 911A of the Corporations Act in connection with the offering of investment opportunities by Provide since 28 September 2020. As the investigation progressed, ASIC formed the view that other contraventions of the Corporations Act and the ASIC Act may have occurred. On 5 August 2022, ASIC formally amended the scope of its investigation to include suspected contraventions of ss 1041E, 1041F and 1041H of the Corporations Act and ss 12DA, 12DB and 12DF of the ASIC Act, which provisions concern (in broad terms) false, misleading and/or deceptive statements, representations and conduct in relation to financial services.

72 Before the Notice the subject of this proceeding was issued on 28 September 2022, ASIC issued two prior notices to Provide pursuant to s 33 of the ASIC Act. The first was issued on 4 April 2022. On 6 May 2022, Provide’s then solicitors, Galbally & O’Bryan, produced books pursuant to the first notice on Provide’s behalf. The second notice was issued on 16 June 2022, with compliance required by 30 June 2022. Mr McGuire deposed that the second notice was the subject of correspondence and discussion with Provide’s new solicitors, SBA Law, between 30 June 2022 and 19 September 2022. Among other things, Provide challenged the basis on which the books specified in the second notice were sought. While ASIC maintained that the books were properly sought, the second notice was ultimately withdrawn following the expansion by ASIC of the scope of its investigation concerning Provide.

73 The Notice the subject of this proceeding was issued on 28 September 2022. The Notice sought production of 15 categories of documents by 11 October 2022. The categories encompassed a range of documents and records relating to Provide’s business, including client documentation,

financial records, agreements with third party service providers, correspondence, and invoices for payments made by Provide. Relevantly for the present application, the Notice required Provide to produce books in response to the following categories, being the categories in respect of which ASIC seeks orders for compliance.

1. Client Register, recording all Clients.
2. For all Clients, copies of all completed, signed or executed:
 - a. Application Forms;
 - b. Drawdown Notices;
 - c. Bills of Exchange; and
 - d. Corporate Guarantees.
3. Books (including but not limited to emails and other correspondence) recording the provision of any executed Corporate Guarantee to any Client.
- ...
12. In relation to any client review or testimonial by any Client, or otherwise appearing in the Company's brochures or Website:
 - a. Correspondence to/from the Client;
 - b. Correspondence to/from Trustpilot; and
 - c. Correspondence with any third party, including but not limited to Online Investments Pty Ltd.

74 On 10 October 2022, one day before the date for compliance specified in the Notice, SBA Law sought an extension of time to comply, noting that Provide had recently appointed a new director (Mr Chan). ASIC agreed to an extension of time, with the books sought by the Notice to be produced in two tranches with the first tranche to be produced on 18 October 2022 and the second on 25 October 2022.

75 On 18 October 2022, immediately before the time by which Provide was required to produce the first tranche of books in response to the Notice, SBA Law wrote to ASIC again challenging the basis of ASIC's investigation and the basis on which it sought the production of books from Provide, and seeking confirmation that ASIC would not require compliance with the Notice for at least 14 days until after ASIC's substantive response to Provide's correspondence. Provide did not produce any books in response to the Notice at that time.

76 In its response dated 28 October 2022, ASIC rejected the matters raised by SBA Law, stated that it considered Provide to have not complied with the Notice, and further stated that ASIC

would not take steps to enforce compliance with the Notice if all books required by the Notice were produced by 4.00 pm on 11 November 2022.

77 Provide did not produce books in response to the Notice by 11 November 2022. Instead, at 3.55pm, ASIC received a letter from yet another firm of solicitors appointed to represent Provide, Strongman & Crouch. The letter stated that Strongman & Crouch had been retained to act for Provide the previous day. The letter asserted that there was a proper basis for Provide not to produce documents sought by the Notice. The letter requested ASIC to provide it with information concerning ASIC's investigation, following which Provide would consider its position. The letter also stated that Strongman & Crouch were yet to receive the files from Provide's former solicitors, SBA Law.

78 On 17 November 2022, the Australian Government Solicitor (**AGS**), representing ASIC, wrote to Strongman & Crouch refusing to provide further information and advising that ASIC intended to exercise its rights under s 70(3) of the ASIC Act if the documents the subject of the Notice were not produced by 4.00 pm on 21 November 2022.

79 Further correspondence was sent over the next few days. On 24 November 2022, Strongman & Crouch wrote to ASIC stating that Provide intended to produce "certain documents" described in the Notice by 5:00 pm on 25 November 2022, and "all other documents" described in Notice "as soon as practicable".

80 On 25 November 2022, Strongman & Crouch (on behalf of Provide) produced 11 documents. On 1 December 2022, Strongman & Crouch produced a further tranche of 79 documents and stated that Provide intended to produce a further, final tranche of documents the following week.

81 As noted earlier, Mr McGuire deposed that, having reviewed the material produced by Provide on 25 November 2022 and 1 December 2022 in response to the Notice, he identified that Provide had produced no documents in response to categories 1, 2, 3, 7(d), 12, 13 or 14 of the schedule to the Notice. As a result, on 2 December 2022 ASIC commenced this proceeding by filing an originating process seeking an inquiry by the Court pursuant to s 70(3) into Provide's compliance with the Notice and an order that Provide produce to ASIC, on a date to be determined by the Court, all books described in the Notice.

Events since the commencement of proceeding

82 On 9 December 2022, Strongman & Crouch (on behalf of Provide) produced a further tranche of documents, which Strongman & Crouch described as the “final” tranche. That tranche comprised one document responsive to category 1 of the Notice, and 89 documents responsive to category 2, being bills of exchange, drawdown notices and application forms. All but one of the documents produced contained redactions, which were applied to the personal information of Provide’s lenders (also referred to in Provide’s documents as “financiers” and as “clients”). In correspondence accompanying the tranche, Strongman & Crouch stated that Provide was not aware of any further documents responsive to the Notice.

83 On 23 December 2022, the AGS wrote to Strongman & Crouch stating that Provide had not complied fully with the Notice by reason of the redactions that had been made to the documents produced and Provide did not appear to have produced books in categories 3, 7(d), 12, 13 and 14 of the Notice.

84 On 23 January 2023, Strongman & Crouch (on behalf of Provide) produced further documents (more than 130) responsive to category 14 of the Notice. Strongman & Crouch stated in correspondence that Provide had no books to produce in relation to, relevantly, categories 3 and 12 and that the redactions applied to the documents produced in response to categories 1 and 2 were limited to the personal information of Provide’s financiers in accordance with Provide’s obligations under contract and under the *Privacy Act 1988* (Cth) (specifically, Australian Privacy Principle 6).

85 On 27 January 2023, the AGS wrote to Strongman & Crouch explaining why Provide was not legally entitled to redact documents produced to ASIC pursuant to the Notice for the reasons that:

- (a) in respect of Provide’s obligations under the *Privacy Act 1988* (Cth), Australian Privacy Principle 6 includes an exception such that information may be disclosed by an entity if the disclosure is required or authorised under an Australian law;
- (b) in respect of Provide’s obligations under contract, the statutory requirement to comply with the Notice overrides any contractual obligation of confidentiality (as per *Australian Securities Commission v Zarro* (1991) 32 FCR 546) and, in any event, the confidentiality obligations in Provide’s contracts with its clients were expressly subject to disclosures required by law.

86 On 27 January 2023, Strongman & Crouch (on behalf of Provide) produced a further four documents responsive to category 13 of the Notice which, Strongman & Crouch asserted, had been inadvertently omitted from the production made four days earlier.

87 On 30 January 2023, Strongman & Crouch wrote to the AGS stating that Provide did not accept that the Notice had been validly issued and that Provide maintained that its contractual and statutory obligations precluded it from providing all documents to ASIC in unredacted form. The letter did not respond to the matters raised by the AGS in its letter of 27 January 2023, but contained a bare assertion that Provide was entitled to redact documents produced to ASIC.

Applicable principles

88 The applicable principles can be stated relatively briefly.

89 Section 33(1) of the ASIC Act provides as follows:

ASIC may give to a person a written notice requiring the production to a specified member or staff member, at a specified place and time, of specified books that are in the first-mentioned person's possession and relate to:

- (a) affairs of a body corporate; or
- (ab) affairs of a registered scheme; or
- (b) a matter referred to in any of paragraphs 31(1)(g) to (m), inclusive; or
- (c) a matter referred to in paragraph 32A(c) or (d).

90 Paragraphs 31(1)(g) to (m) of the ASIC Act include a dealing in financial products and advice given about financial products, and paragraphs 32A(c) and (d) include the supply of a financial service and the financial service.

91 Notices requiring document production, such as notices under s 33(1), are “to be reasonably, not preciously, construed and the terms used in notices will ordinarily take their meaning from the commercial circumstances in which the notices are given”: *ASIC v Maxi EFX* at [92] per Wigney J citing *Melbourne Home of Ford Pty Ltd v Trade Practices Commission (No 3)* (1980) 31 ALR 519 at 531. The expression “specified books” imports a requirement that the documents which are required to be produced be identified in the notice with sufficient clarity and precision to enable the recipient to know what documents come within the notice terms and to form a view about what must be produced so as to comply with the notice: see *ASIC v Maxi EFX* at [90] per Wigney J (and the authorities there cited).

92 As explained by Wigney J in *ASIC v Maxi EFX* at [103]-[110], the word “possession” is not defined in the ASIC Act. However, by the operation of s 5(2)(b) of the ASIC Act, the definition of “possession” in ss 9 and 86 of the Corporations Act is incorporated. The effect of those provisions is that possession means “possession, custody or control”. Possession in the sense used in s 33(1) includes having a de facto power to produce the documents held by another person: *ASIC v Maxi EFX* at [114].

93 Any obligation of confidentiality that exists with respect to the specified books must cede to the statutory requirement to comply with a notice issued under s 33: *Australian Securities Commission v Zarro* (1991) 32 FCR 546 at 556 per Spender J.

94 In relation to an inquiry under s 70(3), certification by ASIC pursuant to s 70(2) of the ASIC Act enables, rather than obliges, the Court to inquire into the case; however, certification will ordinarily provide a sufficient reason for the Court to conduct an inquiry into the alleged non-compliance: *Insurance and Superannuation Commissioner v Glaser* (1997) 79 FCR 505 at 509-510 per Mansfield J. Having embarked on an inquiry, the Court has a discretion whether or not to make an order under s 70(3) that a person comply with the requirement. The Court may decline to make such an order if it would be a futile exercise of power, contrary to the objects of the ASIC Act, or if the person has a “reasonable excuse” for not complying: *Australian Securities Commission v Kutzner* (1997) 25 ACSR 723 at 729-732 per Heerey J. The person who has been found to have failed to comply with a requirement bears the evidential burden of demonstrating a reasonable excuse for non-compliance: *ASIC v Maxi EFX* at [81] per Wigney J, citing *Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority* [2017] VSC 573 at [82] per Ginnane J.

95 As noted earlier, in the present case, Provide advanced no submissions and adduced no evidence on the issue of non-compliance or reasonable excuse. That does not mean that the Court must accept the evidence adduced by ASIC and find non-compliance proved. The Court must assess ASIC’s evidence having regard to its inherent strengths and weaknesses: see *Maxi EFX Global AU Pty Ltd v Australian Securities and Investments Commission* (2021) 284 FCR 643 (upholding Wigney J at first instance) at [39].

The Services Agreement

96 The Services Agreement entered into between Provide and Online Investments has some relevance to the issues raised in this proceeding. Having regard to the terms of the Services Agreement, it is likely that many business records relating to Provide’s business would have

been created and held by Online Investments. Amongst the services that Online Investments agreed to supply to Provide were bookkeeping, administration and documentation facilitation, which were described as to facilitate bookkeeping, tax compliance, a “Financier” register and secure storage of client documentation on behalf of Provide.

97 Again, having regard to the terms of the Services Agreement, business records relating to Provide’s business that are held by Online Investments would be in the legal control of Provide. It is clear from the terms of the Services Agreement that Online Investments provided services to Provide as a contractor and that Provide retains control over all documents created by Online Investments for the purposes of Provide’s business and recording transactions undertaken in the course of Provide’s business. Further, pursuant to cl 3.2(e) of the Services Agreement, Online Investments warrants that it and its personnel will comply with any reasonable requirements and directions of Provide in relation to the provision of the services under the agreement. It follows that, to the extent that the books of Provide described in the Notice are held by Online Investments, the fact that the books are so held could not be a reasonable excuse for Provide to fail to produce those books in accordance with the terms of the Notice.

Category 1

98 Category 1 of the Notice was as follows:

Client Register, recording all Clients.

99 The term “Client Register” is not defined in the Notice. However, “Client” is defined to mean “any person that loaned money to [Provide] pursuant to a Credit Facility Agreement or a Bill Facility Agreement during the Relevant Period”. The “Relevant Period” is defined to mean the period from 26 September 2020 to the date of the Notice, 28 September 2022.

100 Ms Smith deposed that one document corresponding to category 1 of the Notice was produced by Provide on 9 December 2022. A copy of that document is annexed to Ms Smith’s affidavit dated 9 February 2023. The document is one page in length and contains a table with nine columns and 30 rows. The first column is entitled “Financier” which is the term used by Provide for its lenders (who are also referred to as clients). All of the entries in this column are redacted. It may be that the second row of the table has been redacted in its entirety, although that is unclear. The balance of the columns set out information that appears to relate to loan agreements entered into with Provide by each financier listed in the first column. That information includes what appears to be client reference number, the amount of the loan, the

term of the loan, the applicable interest rate, the start date and the maturity date of the loan, and the payment intervals under the loan.

101 ASIC submitted that category 1 requires the production of a register that identifies every person who loaned money to Provide, pursuant to a credit facility agreement or a bill facility agreement, from 26 September 2020 until 28 September 2022. ASIC submitted that, having regard to Provide’s apparent or stated business activity and other produced documents, it is likely that Provide has failed to produce documents responsive to category 1. In support of that contention, ASIC relies on the following evidence of Ms Smith:

- (a) The document produced by Provide identifies only four clients with loan agreements that have a start date before 31 January 2022. However, a general ledger report that was also produced by Provide in response to the Notice on 9 December 2022, and which is also annexed to Ms Smith’s affidavit, appears to show that Provide paid interest to at least 12 clients in January 2022 whose names and/or client reference numbers do not appear in the client register produced by Provide. The general ledger report also appears to show interest being paid to a client during the Relevant Period after January 2022 whose client reference number does not appear in the client register produced by Provide.
- (b) Reviews posted online for Provide on “Trustpilot” (a third party consumer review website), and visible as at 6 September 2022 and 1 February 2023, included reviews posted by individuals whose names also appear in the general ledger report as persons to whom interest payments were made in January 2022. As stated above, however, those individuals do not appear in the client register produced by Provide.
- (c) Several of the drawdown notices produced by Provide on 9 December 2022 refer to previous investments having been “rolled over”. However, the “rolled over” investments, identifiable by their amounts and the client reference numbers, do not appear on the client register produced by Provide. In her affidavit, Ms Smith specifically identifies three such drawdown notices.

102 ASIC further submitted that, in circumstances where Provide’s website stated that it has had “over 1000 clients”, it would seem anomalous that the client register produced by it records only 30 clients.

103 On the evidence before me, no explanation for, or response to, the matters identified by ASIC has been offered by Provide.

104 Having regard to the evidence adduced by ASIC, and the absence of any explanation by Provide, I am satisfied that it is more probable than not that other documents responsive to category 1 of the Notice exist and are in the possession, custody or control of Provide, and that Provide has failed to produce those documents in compliance with the Notice. Companies that conduct a business of borrowing monies from the public for the purposes of investment would ordinarily keep and maintain a register (or registers) of their past and present clients. The fact that Provide produced a register in response to the Notice indicates that it ordinarily maintains records of this kind. Its failure to produce a register that includes all clients who loaned money to Provide in the period from 26 September 2020 until 28 September 2022 is a failure to comply with the Notice.

105 ASIC also submitted that the production of a redacted copy of the client register involved a failure to comply with category 1 of the Notice. I accept that submission. The contentions to the contrary advanced by Strongman & Crouch in correspondence with ASIC, referred to earlier in these reasons, can only be described as spurious. At the hearing of this application, I was informed by the parties that Provide had agreed to provide the client register, and all other documents produced to ASIC, in unredacted form, but that production was yet to occur. No explanation was proffered by Provide as to its change in position and why the documents had not already been produced to ASIC in unredacted form. Accordingly, as at the date of the hearing, the position remained that Provide had failed to comply with the Notice.

Category 2

106 Category 2 of the Notice was as follows:

For all Clients, copies of all completed, signed or executed:

- a. Application Forms;
- b. Drawdown Notices;
- c. Bills of Exchange; and
- d. Corporate Guarantees.

107 As noted above, “Client” is defined in the Notice to mean “any person that loaned money to [Provide] pursuant to a Credit Facility Agreement or a Bill Facility Agreement during the Relevant Period” and the “Relevant Period” is defined to mean the period from 26 September 2020 to 28 September 2022.

108 Ms Smith deposed that, on 9 December 2022, Provide produced 89 documents responsive to category 2, comprising executed application forms, drawdown notices and bills of exchange for at least 30 clients. Redactions had been applied to all but one of those documents, masking information including the “financier” details in the application forms, the details of addressees in the drawdown notices and the details of the drawee and acceptor in the bills of exchange.

109 ASIC contended that Provide had failed to comply with category 2 of the Notice in three ways. First, it had failed to produce the specified documents for all persons that loaned money to Provide pursuant to a bill facility agreement or credit facility agreement during the period 26 September 2020 until 28 September 2022. Second, it had failed to produce copies of the bill facility agreements, credit facility agreements and corporate guarantees. Third, it had impermissibly redacted the documents it produced.

110 In respect of the first alleged failure, ASIC relied on similar evidence to category 1. The following matters can be noted:

- (a) Ms Smith deposed that the general ledger produced by Provide shows, as at 31 January 2022, interest payments being paid by Provide to at least 12 clients. ASIC submitted that it is reasonable to infer that, at that time, there existed at least 12 executed facility agreements and associated category 2 documents.
- (b) The client register produced by Provide on 9 December 2022 (in response to category 1) refers to 30 clients. Only 4 of those clients had loans which commenced prior to 31 January 2022 (who may have formed part of the cohort of 12 clients evidenced by the general ledger). Again, it is reasonable to infer that, at that time, there existed executed facility agreements and associated category 2 documents for those 30 clients.
- (c) Based only on the general ledger and the client register, there ought to be complete sets of category 2 documents for at least 38 clients, but full sets of documents have not been produced for that many clients.
- (d) Mr McGuire deposed that Provide has not produced application forms, drawdown notices and bills of exchange for particular clients who can be identified by their reference number in the client register (ie, there are no such documents bearing those reference numbers in the documents produced by Provide).
- (e) Ms Smith deposed that three drawdown notices produced by Provide refer to amounts rolled over from earlier bills, which are referred to by bill numbers. Provide has not produced any drawdown notices or bills of exchange referable to those earlier bills.

111 Having regard to the evidence adduced by ASIC, and the absence of any explanation by Provide, I am satisfied that it is more probable than not that other documents responsive to category 2 exist and are in the possession, custody or control of Provide, and that Provide has failed to produce those documents in compliance with the Notice. To avoid any doubt about the matter, category 2 of the Notice requires Provide to produce the documents in respect of all loans made to Provide pursuant to a bill facility agreement or credit facility agreement during the period 26 September 2020 to 28 September 2022.

112 In relation to the second alleged failure (being the failure to produce copies of the bill facility agreements, credit facility agreements and corporate guarantees), ASIC has not persuaded me that it is more likely than not that Provide has failed to produce documents in accordance with the Notice. There was a degree of confusion with respect to ASIC's submissions and evidence on this issue.

113 Each of Mr McGuire and Ms Smith annexed a copy of application forms apparently used by Provide in its business. The documents are titled "Application Form" and contain five schedules. The first schedule is also titled "Application Form" and requires the details of the loan to be completed (the lender's name and contact details, the proposed amount of the loan, the proposed term, the interest rate and interest payment intervals) and the form contemplates signature by the named "financier" as lender and Provide as borrower. The second schedule contains the terms of the bill facility agreement (and, in one case, a credit facility agreement). The third schedule contains a pro forma drawdown notice. The fourth schedule contains a pro forma bill of exchange. The fifth schedule contains the terms of the corporate guarantee which bear what purports to be a signature of Nicholas Lane, who is described as a director of Chorus International Services (BVI) Ltd, which company is described as the sole corporate director of a company called 202 Investments Ltd (the guarantor). On the face of the application forms, it appears likely that the bill facility agreement/credit facility agreement and the corporate guarantee are recorded as an agreement by the execution of the application form by the lender and Provide in schedule 1, and that no other copy of the bill facility agreement/credit facility agreement and corporate guarantee are brought into existence.

114 The form of documentation used by Provide to record its borrowing arrangements appears to have been recognised by ASIC in its formulation of category 2 of the Notice. Category 2 requires production of application forms, drawdown notices, bills of exchange and corporate guarantees. The category does not refer to bill facility agreements or credit facility agreements,

presumably because ASIC understood that those documents are incorporated within the application forms. In contrast, drawdown notices and bills of exchange would be separately created (as contemplated by the use of pro forma terms in schedules 3 and 4 of the application forms). By including a reference to “corporate guarantees” in category 2 of the Notice, ASIC appears to have assumed that the corporate guarantees were documented separately to the signed application forms. I have not identified any basis in the evidence for that assumption. To the contrary, the evidence suggests that the corporate guarantees were only ever documented as schedule 5 to the application forms.

115 In relation to the third alleged failure, and for the same reasons given in respect of category 1, I accept ASIC’s submission that the production of redacted application forms, drawdown notices and bills of exchange involves a failure to comply with category 2 of the Notice.

Category 3

116 Category 3 of the Notice was as follows:

Books (including but not limited to emails and other correspondence) recording the provision of any executed Corporate Guarantee to any Client.

117 Ms Smith deposed that Provide informed ASIC in correspondence (through its solicitors Strongman & Crouch) that it had no documents to produce in response to category 3.

118 For the reasons explained in respect of category 2, I am not persuaded that corporate guarantees for the loans were documented separately to the application forms. There is no evidence suggesting the existence of separately documented corporate guarantees. On the current state of the evidence, I consider it more likely than not that the only form of corporate guarantees that exist are those contained in schedule 5 of the application forms.

119 It follows that category 3 required production of all communications recording the provision of executed application forms to Provide’s clients.

120 Having regard to the evidence adduced on the application, I infer that documents in category 3 are more likely than not to exist. In the relevant period (covered by the Notice), the evidence shows that Provide conducted a business which included obtaining loans from members of the public. The business was promoted by a website. Lenders were invited to apply to make loans by way of online applications. At the very least, Provide obtained loans from some 38 clients. The loans required the execution of application forms which included, as schedule 5, the corporate guarantee. As a matter of ordinary business practice, the executed application forms

containing the corporate guarantee would be provided to the lenders either by mail or by email or by some other form of electronic communication. The only circumstance in which that would not occur is if all dealings between Provide and clients occurred in person and the executed documents were physically handed to the clients upon execution. There is nothing in the evidence that suggests that that was Provide's method of business operation. If it was, it would have been a straightforward matter for Provide's solicitors, Strongman & Crouch, to provide that explanation to ASIC. Strongman & Crouch provided no explanation for the non-existence of this category of documents.

121 Having regard to these matters, I infer that documents responsive to category 3 exist and that Provide has failed to produce them in compliance with the Notice. I more comfortably draw that inference in circumstances where Provide has offered no explanation as to why such documents do not exist.

Category 12

122 Category 12 of the Notice was as follows:

In relation to any client review or testimonial by any Client, or otherwise appearing in the Company's brochures or Website:

- a. Correspondence to/from the Client;
- b. Correspondence to/from Trustpilot; and
- c. Correspondence with any third party, including but not limited to Online Investments Pty Ltd.

123 Ms Smith deposed that Provide informed ASIC in correspondence (through its solicitors Strongman & Crouch) that it had no documents to produce in response to category 12.

124 ASIC submitted that it can be inferred that documents responsive to category 12 exist, and are in the possession, custody or control of Provide, by reason of the following matters:

- (a) Provide's website as at 27 January 2022, screenshots of which were adduced in evidence, contained detailed reviews or testimonials concerning Provide's business that are attributed to individuals identified by their first names and who represent that they are clients of Provide.
- (b) The Provide brochure given to prospective clients contained client reviews and testimonials from clients who are identified by their full names. Two of the clients to whom reviews are attributed in the brochure appear in the general ledger report produced by Provide as individuals to whom interest payments were made during the

“Relevant Period” as defined in the Notice. The name “Trustpilot” appears next to the reviews set out in the brochure.

- (c) The Trustpilot website as at 6 September 2022 and 1 February 2023, screenshots of which were adduced in evidence, also contained client reviews for Provide posted in the names of individuals who are also recorded in the general ledger report produced by Provide as individuals to whom interest payments were made during the “Relevant Period” as defined in the Notice.

125 On the basis of that evidence, I infer that it is more probable than not that documents within category 12 exist. In order for client reviews to be reproduced on Provide’s website and in Provide’s business brochure, at the very least the client must have communicated the review to Provide. It is more probable than not that a record of the communication exists. I more comfortably draw that inference in circumstances where Provide has not offered any explanation for why no such documents exist.

126 In reaching that conclusion, I have not overlooked the possibility that the client reviews published on Provide’s website, in its brochure and on the Trustpilot website are fictitious. However, no admission has been made by Provide that the client reviews are fictitious and I therefore proceed on the basis that the reviews are what they appear to be, authentic reviews by legitimate clients of Provide.

Conclusion

127 In conclusion, I am satisfied on the evidence before me that Provide has failed to comply with categories 1, 2, 3 and 12 of the schedule to the Notice without reasonable excuse in the manner described above.

Orders sought

128 As noted earlier, by its originating process, ASIC sought an order that Provide produce to ASIC all books described in the Notice. However, at the hearing of the application, ASIC narrowed the form of order that it sought to the following:

Within 14 days of the date of this order, the Defendant comply with the Plaintiff’s notice dated 28 September 2022 issued to the Defendant pursuant to s 33(1) of the Australian Securities and Investments Commission Act 2001 (Cth) (**Notice**) by producing to the Plaintiff, in unredacted form, all books in its possession described in paragraphs 1, 2, 3 and 12 of the schedule to the Notice not otherwise produced to the Plaintiff, including an unredacted copy of each document previously produced in redacted form.

129 In my view, the Court has power to make an order of this kind under s 70(3). Having concluded that Provide has failed to comply with the Notice in respect of categories 1, 2, 3 and 12 of the schedule to the Notice, I am satisfied that it is appropriate to make an order largely in the form sought by ASIC. I propose, however, to make two changes. First, I will replace the word “possession” (which reflects the statutory language) with the expression “possession, custody or control” (which reflects the meaning of the statutory language), so that the obligation imposed on Provide by the order is clear. Second, I will extend the period of compliance to 28 days to enable Provide to conduct all appropriate searches for documents in its possession, custody or control, including documents held by Online Investments.

130 At the hearing, ASIC sought an additional order that was not contained in its originating process as follows:

Within 21 days of the date of this order, the Defendant file and serve an affidavit sworn or affirmed by a director or authorised officer of the Defendant that:

2.1. identifies each book produced to the Plaintiff in compliance with the order in paragraph 1;

2.2. states the searches undertaken by or on behalf of the Defendant for books in its possession referred to in the order in paragraph 1; and

2.3. certifies that Provide has no unproduced books in its possession described in the order in paragraph 1.

131 At the hearing, Provide made no objection to the second order sought by ASIC on the basis that it had not been included in the originating process. Provide submitted, however, that the Court was not empowered to make such an order in an application brought under s 70(3).

132 At the hearing, I invited submissions from ASIC whether s 70(3) empowers the Court to make that order or whether there is another source for the Court’s power to do so. ASIC acknowledged that s 70(3) did not “directly” (which I understood to mean “expressly”) empower the Court to make the order, but submitted that the Court could make the order in its inherent jurisdiction. The language of “inherent jurisdiction” in relation to this Court is problematic. More accurately, the Court has such powers as are expressly conferred by statute, that are impliedly conferred by statute or that are “incidental and necessary to the exercise of the jurisdiction or powers so conferred”: *Parsons v Martin* (1984) 5 FCR 235 at 241. ASIC was unable to identify a previous decision of the Court in which such an order had been made in the context of a s 70(3) inquiry.

133 The question whether the Court has power to make the second order sought by ASIC is not straightforward, and the Court has been given very limited assistance on the question.

134 I will commence with the observation that, if the Court has power to make the second order sought by ASIC, I would not hesitate to do so. The evidence before the Court demonstrates a history of delay and obfuscation on the part of Provide in complying with the Notice. The most egregious example is the redaction of documents produced to ASIC. After the AGS correctly informed Provide’s solicitors, Strongman & Crouch, that the purported basis for redacting the documents lacked justification, Strongman & Crouch merely asserted the contrary position. I have previously described Strongman & Crouch’s purported justification for redacting the documents as spurious. Subsequently, Provide agreed to provide unredacted copies of the documents to ASIC, but that had not occurred by the time of the hearing. The failure to produce the unredacted documents was unexplained. There is also a complete failure to explain the non-production of client documents that the evidence shows would have existed during the Relevant Period as defined in the Notice. The evidence gives rise to a strong suspicion that Provide has deliberately refrained from searching for, or obtaining from other persons such as Online Investments, all documents that are responsive to the Notice. In the circumstances of this case, the second order sought by ASIC would assist in providing greater assurance that Provide will comply with the Notice as ordered by the Court.

135 However, the question of the Court’s power is unclear. By its terms, s 70(3) confers on the Court power to order a person, the subject of the inquiry, to comply with the relevant requirement made under Pt 3 (here, compliance with the Notice). The express terms of s 70(3) do not confer power on the Court to order the person to file an affidavit explaining the searches that have been undertaken in compliance with the order or certifying the person’s compliance with the order.

136 It is a well-established principle that a grant of power carries with it everything necessary for its exercise: see *Grassby v The Queen* (1989) 168 CLR 1 at 16-17 per Dawson J (Mason CJ, Brennan J and Toohey J agreeing). In *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, Gaudron, Gummow and Callinan JJ explained (at [51], citations omitted):

The term “necessary” in such a setting as this is to be understood in the sense given it by Pollock CB in *Attorney-General v Walker*, namely as identifying a power to make orders which are reasonably required or legally ancillary to the accomplishment of the specific remedies for enforcement provided In this setting, the term “necessary” does not have the meaning of “essential”; rather it is to be “subjected to the touchstone of reasonableness”.

137 Those principles were applied by the High Court majority in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 (*ABCC*) (at [40] per Kiefel CJ and at [118] per Keane, Nettle and Gordon JJ) in the context of a statutory power to impose a pecuniary penalty under s 546(1) of the *Fair Work Act 2009* (Cth). However, as observed by Gageler J in *ABCC* (at [53], in dissent as to the result), the application of that principle to the construction of a statute has traditionally been approached with restraint where the ancillary power sought to be justified is restrictive of liberty and where the express power to which that ancillary power is sought to be appended is not incapable of exercise without it (referring to *Trolly, Draymen and Carters Union of Sydney and Suburbs v Master Carriers Association (NSW)* (1905) 2 CLR 509 at 523-524 per O'Connor J, quoting *Fenton v Hampton* (1858) 11 Moo PCC 347 at 360 [14 ER 727 at 732] and *Transport Workers Union (NSW) v Australian Industrial Relations Commission* (2008) 166 FCR 108 at [37]-[38]).

138 An argument can be made that an order of the kind sought by ASIC may be reasonably required or legally ancillary to the accomplishment of what is specifically provided for in s 70(3). As the heading to the section states, s 70 is concerned with the powers of the Court where there has been non-compliance with a requirement made under Pt 3 of the ASIC Act, which is concerned with ASIC's investigation and information-gathering powers. The power conferred on the Court by s 70(3) arises in circumstances where ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under Pt 3, ASIC has certified that failure to the Court, the Court has inquired into the case and the Court has reached the same conclusion. The purpose of the power conferred by s 70(3) is to compel compliance with the relevant requirement made under Pt 3 by the use of the Court's coercive power. Where the inquiry reveals a history of delay and obfuscation on the part of the relevant person, and where no satisfactory explanation for the failure to comply is provided to the Court during the inquiry, it is arguable that the Court's power to order compliance is appropriately exercised by an order requiring the relevant person to file an affidavit attesting to the steps taken to comply and the person's belief that the relevant requirement has been complied with.

139 The contrary argument is that the second order sought by ASIC intrudes upon the liberty of Provide and its director or an authorised officer. The order compels the swearing or affirmation of an affidavit stating the steps taken to comply with the order of the Court and certifying compliance with the Court's order. In circumstances where non-compliance with the Court's

order would constitute a contempt of Court, the order can be seen to intrude materially upon the liberties of Provide and its director or an authorised officer.

140 Having regard to the competing arguments summarised above, I am not persuaded that the second order sought by ASIC is within the implied power of the Court arising under s 70(3).

141 I have also given consideration to whether the Court has power to make the second order under s 23 of the FCA Act. That section provides as follows:

The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate.

142 Although the power conferred on the Court by s 23 is very broad, it is subject to limitations. Relevantly for present purposes, s 23 cannot be relied upon to overcome limits imposed on the Court's power by another statute. In *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 (*Thomson*), the majority (Gibbs CJ, Stephen, Mason and Wilson JJ) observed (at 161, in reference to s 80 of the *Trade Practice Act 1974* (Cth)):

When a specific statute which invests the Court with jurisdiction in matters of a particular class does so in such a way as to limit the power of the Court to grant relief of a particular kind, there is no basis for transcending that limitation by recourse to the general provisions of the *Federal Court of Australia Act*.

143 I consider that the principle stated in *Thomson* is applicable to s 70 of the ASIC Act. Section 70 is a specific provision which empowers the Court to inquire into alleged non-compliance with a requirement made under Pt 3 and order compliance. I do not consider that s 23 can be relied on as a source of power to make orders relating to compliance with a requirement made under Pt 3 that are beyond the express and implied power conferred by s 70.

144 For those reasons, I do not consider that the Court has power to make the second order sought by ASIC at the hearing, and I therefore decline to do so.

145 ASIC also sought an order for the payments of its costs. ASIC was successful on its application and I consider that costs should follow the event. When pronouncing judgment, ASIC informed the Court that it wishes to apply for part of its costs be paid on an indemnity basis. Orders will be made for the filing of submissions and any evidence on that question.

Conclusion

146 For the reasons given above, I find that Provide has failed to comply with the Notice. I will make an order that, within 28 days of the date of this order, Provide is to comply with the

Notice by producing to ASIC, in unredacted form, all books in its possession, custody or control described in paragraphs 1, 2, 3 and 12 of the schedule to the Notice not otherwise produced to ASIC, including an unredacted copy of each document previously produced in redacted form. On the question of the costs of the proceeding, I will make orders for the filing of any affidavit and an outline of submissions by each of the parties. I will determine the question of costs on the papers.

I certify that the preceding one hundred and forty-six (146) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate:



Dated: 25 September 2023