FEDERAL COURT OF AUSTRALIA

Cruickshank v Australian Securities and Investments Commission [2022] FCAFC 128

Appeal from:	*Australian Securities and Investments Commission v Big Star Energy Limited (No 3)* [2020] FCA 1442; 148 ACSR 334; 389 ALR 17 *Australian Securities and Investments Commission v Blue Star Helium Limited (No 4)* [2021] FCA 1578; 158 ACSR 196
File number:	WAD 25 of 2022
Judgment of:	**ALLSOP CJ, JACKSON AND ANDERSON JJ**
Date of judgment:	5 August 2022
Catchwords:	**CORPORATIONS** – appeal from the decision of the liability judgment and the orders and declarations made in the penalty judgment – continuous disclosure obligations pursuant to s 674(2A) of *Corporations Act 2001* (Cth) – whether information not disclosed was material to relevant investors pursuant to s 677 – whether a reasonable person would expect the information, were it generally available, to have a material effect on the price or value of the Company's shares for the purposes of s 674(2)(c)(ii) and s 677 of the Act – whether the relevant information satisfies the conditions in s 674(2)(b) and (c) of the Act – whether appellant contravened s 180 of the Act by failing to exercise care and diligence in causing or permitting the company to contravene s 674(2A) of the Act –disqualification order pursuant to s 206C of the Act – whether disqualification order was justified – appeal dismissed
Legislation:	*Corporations Act 2001* (Cth) ss 180, 206C, 674, 677
Cases cited:	*Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* (2010) 268 ALR 303; [2010] FCA 292 *Australian Securities and Investments Commission v Flugge (No 2)* (2017) 342 ALR 478; [2017] VSC 117 *Australian Securities and Investments Commission v Forex Capital Trading Pty Ltd* [2021] FCA 570

Australian Securities and Investments Commission v Healey (No 2) (2011) 196 FCR 430; [2011] FCA 1003

Australian Securities and Investments Commission v Helou (No 2) [2020] FCA 1650

Australian Securities and Investments Commission v Macdonald (No 12) (2009) 259 ALR 116; [2009] NSWSC 714

Australian Securities and Investments Commission v Soust (No 2) (2010) 76 ACSR 1; [2010] FCA 388

Australian Securities and Investments Commission v Vocation Ltd (In liq) [2019] FCA 807; 136 ACSR 339; 371 ALR 155

Australian Securities and Investments Commission v Big Star Energy Limited (No 3) [2020] FCA 1442; 148 ACSR; 389 ALR 17

Australian Securities and Investments Commission v Bluestar Helium Limited (No 4) [2021] FCA 1578; 158 ACSR 196

Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5) [2009] FCA 1586; 264 ALR 201; 76 ACSR 506

Australian Securities and Investments Commission v GetSwift Ltd [2021] FCA 1384

Forrest v Australian Securities and Investments Commission [2012] HCA 39; (2012) 247 CLR 486

Gillfillan v Australian Securities and Investments Commission (2012) 92 ACSR 460; [2012] NSWCA 370

Grant-Taylor v Babcock & Brown Limited (in liq) [2016] FCAFC 60; 330 ALR 642; 113 ACSR 362; 245 FCR 402

James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332

Jubilee Mines NL v Riley (2009) 40 WAR 299

Morley v Australian Securities and Investments Commission (No 2) (2011) 83 ACSR 620; [2011] NSWCA 110

Re Idylic Solutions Pty Ltd; ASIC v Hobbs (2013) 93 ACSR 421; [2013] NSWSC 106

Division:	General Division
Registry:	Western Australia
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency

Number of paragraphs:	149
Date of hearing:	9 May 2022
Counsel for the Appellant:	Mr SM Davies SC with Mr C Chenu and Mr AJC Mossop
Solicitor for the Appellant:	DLA Piper Australia
Counsel for the First Respondent:	Dr O Bigos QC with Mr M Sherman
Solicitor for the First Respondent:	Australian Securities and Investments Commission
Counsel for the Second Respondent:	The Second Respondent did not appear

ORDERS

WAD 25 of 2022

BETWEEN:	**JAMES ANDREW CRUICKSHANK** Appellant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** First Respondent
	BLUE STAR HELIUM LIMITED ACN 009 230 835 Second Respondent

ORDER MADE BY:	**ALLSOP, JACKSON AND ANDERSON JJ**
DATE OF ORDER:	**5 AUGUST 2022**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 The appellant (**Mr Cruickshank**) appeals from the decision of the primary judge in *Australian Securities and Investments Commission v Big Star Energy Limited (No 3)* [2020] FCA 1442; 148 ACSR 334; 389 ALR 17 delivered on 9 October 2020 (**Liability Judgment**) and the orders and declarations made in *Australian Securities and Investments Commission v Bluestar Helium Limited (No 4)* [2021] FCA 1578; 158 ACSR 196, delivered on 16 December 2021 (**Penalty Judgment**).

2 The first respondent to this appeal (**ASIC**) commenced this proceeding at first instance, against the second respondent, Blue Star Helium Limited (**Company**) and Mr Cruickshank. At first instance, ASIC alleged that the Company contravened s 674(2) of the *Corporations Act 2001* (Cth) (**Act**) due to its failure to comply with its continuous disclosure obligations in relation to statements made to the Australian Securities Exchange Limited (**ASX**) with respect to the proposed sale of its oil and gas interests in the Permian Basin of Texas, in the United States of America to Wade Energy Corporation (**Wade Energy**). ASIC sought declarations against the Company in respect of each alleged contravention.

3 In addition, ASIC claimed that Mr Cruickshank contravened:

(a) s 674(2A) of the Act in that he was involved in the Company's contraventions of s 674(2) of the Act; and

(b) s 180(1) of the Act in that he failed to discharge his duties to the Company with the degree of care and diligence required.

4 ASIC sought declarations of contravention against Mr Cruickshank, disqualification orders and orders for pecuniary penalties to be paid by Mr Cruickshank in respect of each alleged contravention.

5 The primary judge in the Liability Judgment found that the Company had contravened its continuous disclosure obligations under s 674 of the Act and as a consequence, Mr Cruickshank contravened his duty of care and diligence to the Company under s 180 of the Act. The primary judge rejected ASIC's claim that Mr Cruickshank was, by his acts or omissions, directly or

indirectly, knowingly concerned in the Company's contravention of the continuous disclosure obligations under s 674(2) of the Act.

RELEVANT FACTS

6 It is convenient to refer to the primary judge's summary of facts from the Liability Judgment, which were not disputed on appeal (headings omitted):

> [1] Over the course of a week in September 2015, the first defendant, a company listed on the Australian Stock Exchange (ASX) and then known as Antares Energy Limited (Antares), announced to the market that it had entered into two agreements to sell resources assets located in Texas, in the United States of America.
>
> [2] Trading in shares in Antares immediately following the announcements was elevated and the share price jumped, initially by some 250%.
>
> …
>
> [4] Some days after the initial announcements to the market about the sale agreements, trading in shares in Antares was halted at the request of Antares and ultimately suspended by the ASX.
>
> …
>
> [9] Antares' principal assets at the relevant time were the oil, gas and other minerals contained in various contiguous properties in the Permian Basin of Texas known as Northern Star and Big Star. Those assets were held in the name of Antares US and are referred to respectively as the Northern Star Assets and the Big Star Assets.
>
> …
>
> [11] At the relevant time the directors of Antares were Mr Cruickshank (originally from Australia but at the relevant time based in the USA), Mr Gregory Shoemaker, Ms Vicky McAppion and Mr Mark Clohessy…
>
> …
>
> [13] Antares US is a company incorporated in the United States. Mr Cruickshank was at the relevant time the President of Antares US. Antares US is a wholly owned subsidiary of Santa Energy Pty Ltd.
>
> …
>
> [15] Wade Energy Corporation (Wade Energy) was a limited liability company incorporated in Texas which sought to acquire the Northern Star Assets and the Big Star Assets. That is, Wade Energy was the prospective purchaser whose identity was not disclosed to the market. Mr Barry Hanson was the Chief Executive Officer of Wade Energy.
>
> …
>
> [72] On Friday 4 September 2015 the closing price for shares in Antares was $0.09. It had a market capitalisation of approximately $21.6 million. Its only material

assets, apart from its investments or its ownership of Northern Star and Big Star, were cash and its investment in Breitburn, which had a value not in excess of approximately $23 million. It had minimal revenue: for the June quarter of 2015, it had achieved $200,000.

[73] Against that, it had a potential liability with respect to unsecured convertible notes with a face value of approximately $47.5 million and with a reset date of 31 October 2015 (according to Antares' half-year financial report for the year ended 30 June 2015).

[74] On 5 September 2015 Antares, by its ultimate wholly owned subsidiary Antares US, entered into purchase and sale agreements with Wade Energy for the sale of the Northern Star Assets for US$148,788,560 and for the sale of the Big Star Assets for US$105,069,420. Those purchase and sale agreements are referred to as the Northern Star PSA and the Big Star PSA respectively, or collectively as the PSAs. Mr Cruickshank signed the PSAs on behalf of Antares.

[75] The Northern Star PSA provided that the purchase price was US$148,788,560 with closing on or before 21 September 2015.

[76] The Big Star PSA provided that the purchase price was US $105,069,420 with closing on or before 30 November 2015.

[77] Otherwise, the terms of the PSAs were for all intents and purposes the same. Notably, there was no express term in either PSA requiring the terms of the agreements or the identity of the buyer to remain confidential. There was no requirement for a deposit to be paid. There was no provision for default penalties. There was no 'subject to finance' clause. There was a 'complete agreement' clause.

[78] It appears that Mr Cruickshank was in Australia on the weekend of 5 and 6 September 2015. He signed the PSAs and forwarded signed copies to Mr Hanson in the early hours of Saturday morning (1.53 am AWST) under cover of an email that said:

> … I will call you Saturday morning your Friday night to discuss our mutual progress towards closing both of these transactions on or before 30th November 2015.

[79] On Sunday 6 September 2015 at 6.01 am AWST Mr Cruickshank received an email from Mr Hanson (and referred to by Mr Bowers in these proceedings as the Funding Email) that stated:

> James,
>
> I got approval on my secondary lender for Northern Star only.
>
> I am working with another on Big Star.
>
> If your Houston group is ready to move on Big Star, it is your call. I [won't] know anything on Big Star [u]ntil midweek.
>
> I missed your call last night, but I will give you a call around 9 am your time.
>
> Barry

[80] Mr Cruickshank replied at 8.15 am AWST:

> Barry,
>
> Congratulations on your approval for Northern Star, I had no doubt you would achieve success.
>
> Additionally, I have no doubt you will ultimately be successful on Big Star so we will be patient as we have exchanged executed Purchase and Sale Agreements and thus you have time on your side.
>
> Well done and congratulations once again,
>
> James

…

[83] On Monday 7 September 2015 the following announcement was released to the market (First PSA Announcement):

> **ANTARES ENERGY EXECUTES PURCHASE AND SALE AGREEMENTS**
>
> **NORTHERN STAR 148,788,560 USD**
>
> **BIG STAR 105,069,420 USD**
>
> The Directors of Antares Energy Limited (ASX:AZZ) are pleased to advise of the execution of two independent Purchase and Sale Agreements with the same Private Equity purchaser for the sale of Northern Star in the amount of 148,788,560 USD and Big Star in the amount [of] 105,069,420 USD.
>
> The closing of these two independent Purchase and Sale Agreements with the same Private Equity purchaser will be on or before the 30th November 2015 and is subject to usual commercial closing conditions and adjustments. The gross pretax proceeds from these transactions are expected to be approximately 250,000,000 USD which will be subject to customary closing adjustments, taxation and frictional costs.
>
> James Cruickshank, Antares' CEO said, 'We are pleased to have executed two independent Purchase and Sale Agreements with the same Private Equity purchaser for both of our Permian Projects being Northern Star and Big Star. This represents another step forward in our Permian Portfolio Strategy of creating, developing, producing and realizing value from our project assets. We look forward to closing both of these transactions.
>
> A Summary Of The Key Highlights Of The Transaction Include:
>
> - Northern Star gross pretax sale proceeds 148,788,560 USD
>
> - Southern Star [sic] gross pretax sale proceeds 105,069,420 USD
>
> - Closing date on or before 30th November 2015
>
> - Private Equity purchaser - Effective date 1st September 2015
>
> - Shareholder meeting information to be announced in due course

…

[86] At 9.41 am AWST a second announcement with that error corrected was provided to the ASX and released by MAP at 9.44 am AWST (Second PSA Announcement). Nothing material arises out of the correction (the announcements are referred to collectively as the PSA Announcements).

…

[93] The clarification announcement (PSA Clarification Announcement) was released to the market at 1.51 pm AWST, shortly before close of market. It read:

> **PURCHASE AND SALE AGREEMENTS**
>
> **NORTHERN STAR & BIG STAR**
>
> **CLARIFICATION OF TERMS**
>
> Antares Energy Limited (ASX:AZZ) is pleased to provide additional clarifying information in relation to the purchase and sale agreements signed for Northern Star & Big Star announced on 7 September 2015.
>
> The gross pretax proceeds from these transactions are expected to be approximately 250,000,000 USD which will be subject to customary closing adjustments, taxation and frictional costs. This amount will be paid in cash.
>
> There are no conditions precedent to be effected prior to settlement.
>
> Antares will not hold any remaining interest in either the Northern Star or Big Star projects after the sale, but will still retain an interest in other Texas projects.
>
> The sale of the Northern Star and Big Star projects is a continuation of Antares' main undertaking of developing for sale, and disposing of, oil and gas tenements, as in keeping with the divestment of the Southern Star project last year.
>
> A Summary Of The Key Highlights Of The Transaction Include:
>
> - Northern Star gross pretax sale proceeds 148,788,560 USD - cash payment only
>
> - Big Star gross pretax sale proceeds 105,069,420 USD - cash payment only
>
> - No conditions precedent
>
> - Closing date on or before 30th November 2015
>
> - Private Equity purchaser
>
> - Effective date 1st September 2015
>
> - Shareholder meeting information to be announced in due course

[94] As is apparent, the PSA Clarification Announcement states that the payment is 'cash payment only', and that there are 'no conditions precedent'. It does not

disclose the name of the purchaser.

…

[140] Prior to the commencement of trading on Monday 7 September 2015 the market capitalisation of Antares was approximately $21.6 million. The closing share price for Antares on the previous trading day, Friday 4 September 2015, was $0.09.

[141] The closing share price of Antares on 7 September 2015, being the day of the PSA Announcements, was $0.315.

[142] The closing share price of Antares on 10 September 2015, being the day of the PSA Clarification Announcement, was $0.50.

…

[144] In the week of 24 August 2015 to 28 August 2015 the total trading volume of Antares shares on the ASX was 513,127 with an average daily traded volume of 102,625.

[145] In the week just prior to the First PSA Announcement, being 31 August 2015 to 4 September 2015, the total trading volume for the week was 302,900 with an average daily traded volume of 60,580.

[146] On 7 September 2015 the day's trading volume was 15,654,227.

ASIC'S CONCISE STATEMENT

7 The trial before the primary judge proceeded by way of ASIC's concise statement and Mr Cruickshank's response. ASIC, by its concise statement filed 28 November 2017 (**Concise Statement**), alleged that the Company disclosed to the market that the purchaser of the Northern Star and Big Star assets was a "private equity firm" but did not disclose that Wade Energy was the purchaser (**Purchaser Identity Information**): Concise Statement [14].

8 ASIC alleged that, at no time prior to the Company's suspension from official quotation by the ASX on 15 September 2015, did the Company:

(a) independently verify or otherwise determine the capacity of Wade Energy to complete either the Northern Star or the Big Star purchase and sale agreements (hereon referred to as the **Northern Star PSA** and the **Big Star PSA** respectively) (**Absence of Independent Verification Information**);

(b) disclose to the market the Purchaser Identity Information;

(c) disclose to the market the Absence of Independent Verification Information; or

(d) disclose to the market that on 6 September 2015, the CEO of Wade Energy advised Mr Cruickshank that he had not yet received all financing approval necessary to complete

the purchase of the Big Star Assets (**Incomplete Financing Approval Information**): Concise Statement at [5] and [17].

9 The information comprising the Purchaser Identity Information, the Absence of Independent Verification Information and the Incomplete Financing Approval Information are collectively referred to as the **Cumulative Information**, as the primary judge defined in the Liability Judgment at [248].

10 ASIC alleged that the Purchaser Identity Information, the Absence of Independent Verification Information and the Incomplete Financing Approval Information was not generally available within the meaning of s 674(2) of the Act at any time during the period from 7 September 2015 to 15 September 2015 (**Relevant Period**): Concise Statement [18].

11 ASIC alleged in its Concise Statement at [19] that if the Purchaser Identity Information, either alone or in combination with the Absence of Independent Verification Information and the Incomplete Financing Approval Information, had been generally available to the market in the Relevant Period, it would have been likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of shares in the Company, given:

(a) the significance of the sale of the Northern Star and the Big Star assets to the financial position of the Company, in particular its ability to redeem any of the Convertible Notes on the next reset date;

(b) the quantum of the sale prices for the Northern Star and the Big Star assets compared with the market capitalisation of the Company;

(c) the likely absence of recognition of the identity of the purchaser amongst investors and potential investors in the Company;

(d) the limited information available to investors and potential investors in the Company of the capacity of Wade Energy or Mr Hanson to complete the purchase of the Northern Star and the Big Star assets; and

(e) investors and potential investors in the Company would have expected that the Company would have undertaken an independent verification and due diligence of the capacity of Wade Energy or Mr Hanson to complete the purchase of the Northern Star and the Big Star assets before announcing to the ASX the sale, without qualification, of those assets to Wade Energy.

12 ASIC alleged that contrary to their continuous disclosure obligations, both the Company and Mr Cruickshank had knowledge of, but failed to notify, the ASX of any of the Purchaser Identity Information, the Absence of Independent Verification Information or the Incomplete Financing Approval Information at any time prior to the suspension of the Company from official quotation by the ASX on 15 September 2015: Concise Statement [20].

13 ASIC, in its Concise Statement at [20], contended that:

(a) the Company failed to notify the ASX of information that was not generally available and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of its securities in contravention of s 674(2) of the Act;

(b) Mr Cruickshank by his acts or omissions was directly or indirectly knowingly concerned in the failure of the Company to disclose to the ASX each of the Purchaser Identity Information, the Absence of Independent Verification Information and the Incomplete Financing Approval Information at any time prior to the suspension of the Company from official quotation by the ASX on 15 September 2015 in contravention of s 674(2A) of the Act; and

(c) Mr Cruickshank failed to discharge his duties to the Company with the requisite degree of care and diligence that a reasonable person in his position would exercise and thereby contravened s 180(1) of the Act by causing or otherwise permitting the Company to fail to disclose to the ASX each of the Purchaser Identity Information, the Absence of Independent Verification Information and the Incomplete Financing Approval Information at any time prior to the suspension of the Company from official quotation by the ASX on 15 September 2015.

MR CRUICKSHANK'S CONCISE STATEMENT RESPONSE

14 Mr Cruickshank filed a response to the Concise Statement on 14 September 2018 (**Response**) which, relevant to this appeal, alleged:

(1) It was a term of the Northern Star PSA and Big Star PSA, alternatively, an underlying requirement of the Company prior to Wade Energy's execution of the contracts, that Wade Energy would not be disclosed as the purchaser of the Northern Star and Big Star assets until after the contracts settled: Response at [7.4].

(2) In the announcements to the ASX, Wade Energy was described as a "private equity purchaser": Response at [13].

(3) Wade Energy required confidentiality with respect to the Northern Star PSA and the Big Star PSA: Response at [13.3].

(4) Had the identity of Wade Energy been disclosed between 7 September 2005 and 14 September 2005, Wade Energy would have withdrawn from the Northern Star PSA and the Big Star PSA: Response at [13.4].

(5) Mr Cruickshank denies the Company failed to notify the ASX of information that was not generally available and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of its securities. Mr Cruickshank denies that the Company acted in contravention of s 674(2) of the Act: Response at [19].

(6) Mr Cruickshank caused disclosures to the ASX but denies that he acted in contravention of s 674(2A) of the Act: Response at [20].

(7) If Mr Cruickshank did contravene s 674(2A) of the Act, which he denies, he says s 674(2B) of the Act applies, because he took all steps that were reasonable in the circumstances to ensure the Company complied with its obligations under s 674(2) of the Act and, after doing so, believed on reasonable grounds that the Company was complying with its obligations under s 674(2) of the Act: Response at [20.1] and [20.2].

(8) Mr Cruickshank denies he failed to discharge his duties to the Company with the requisite degree of care and diligence that a reasonable person in his position would exercise and denies he contravened s 180(1) of the Act: Response at [21].

(9) If Mr Cruickshank did contravene s 180(1) of the Act, which he denies, he says s 180(2) of the Act applies (business judgment rule) in respect of due diligence, testing the ability of Wade Energy to pay and the making of the announcements to the ASX: Response at [21.1], [21.2] and [21.3].

LIABILITY JUDGMENT

15 At the liability trial, ASIC sought to prove materiality of the Purchaser Identity Information and the Cumulative Information through its expert, Mr Lee Bowers, a corporate adviser and equity market consultant, with nine years of specific experience as an analyst specialising in ASX listed mining and exploration companies and 15 years of experience involving direct

interactions with institutions and retail investors. Neither Mr Cruickshank nor the Company adduced any expert evidence on materiality at the liability trial. Mr Cruickshank objected to Mr Bowers' expert evidence on the basis that he did not have the requisite specialised knowledge, because, in Mr Cruickshank's view, Mr Bowers does not have practical experience in buying or selling shares and has not studied the field of market behaviour.

16 The primary judge made the following findings in respect of Mr Bowers' expert evidence and s 674(2) of the Act:

> [445] I accept the expert evidence of Mr Bowers and I have given it significant weight. For the reasons I have given, I am not persuaded by Mr Cruickshank's submissions that I should reject it. Mr Cruickshank evinced no expert evidence that contradicted Mr Bowers. Nor did Mr Cruickshank seek to attack in any real sense the essence of whether the information was material: the focus of the criticism was on his qualifications, his application of specialised knowledge and the delineation of the class of Relevant Investors. The substance of Mr Bowers' evidence as to materiality of the particular information was not challenged.
>
> [446] Mr Bowers' description and assessment of the relevant class of Relevant Investors accords with legal principle: *Grant-Taylor v Babcock & Brown (FC)* at [115]. His explanation of the manner in which investors would assess completion risk and have regard to the significance of the sale price for Antares' main assets accords with the balancing of probabilities explained in *Grant-Taylor v Babcock & Brown (FC)* at [96] and as described by Nicholas J in *ASIC v Vocation* at [519]. Mr Bowers' opinion is that the relevant information if disclosed would be likely to influence a decision - not just 'might'. His evidence addressed the integers of s 674(2)(c) of the *Corporations Act*.
>
> [447] The manner in which he considered the impact of the information that was disclosed by the PSA Announcements, PSA Clarification Announcement and other publicly available information indicates that he considered the broader context in which he was obliged to assume that the information would have been disclosed, a course consistent with that described in *Jubilee Mines v Riley* and *ASIC v Vocation*. The re-setting of the convertible notes in a relatively short time frame was clearly a relevant matter to which he was entitled to have regard. Another example of Mr Bowers' cognisance of the relevance of context is seen in his consideration of references to the Macquarie Bank Facility. Mr Bowers did not ignore the reference to the facility but noted that there was no available information as to its terms or the use to which it could be applied, and also noted that Antares and its auditors did not appear to put any store in the availability of the facility, having regard to the financial position described in the half yearly report and the notes as to Antares' continuation as a going concern.
>
> [448] Mr Bowers' report is indeed detailed. However, in my view it is a clearly elucidated and persuasive explanation of the process undertaken by investors of ascertaining and synthesizing information relevant to their decision-making process.

[449] The general explanations of an assessment of the fundamentals about a company, the assessment of the completion potential and risks of a significant deal and the search for mispricing were readily understandable. Mr Bowers' explanation as to how investors might make those assessments in the particular circumstances of Antares was also readily understandable. His hypothetical calculations that disclosed the expected range of influence of the PSA Announcements and PSA Clarification Announcement provided a reasoned basis for showing that many Relevant Investors would at the time have seen Antares shares as significantly undervalued, so that, absent further information, many shareholders would have been influenced to acquire shares or hold them.

[450] Mr Bowers' assessment of the relevance of the Purchaser Identity Information highlights that disclosure of the name of a purchaser empowers investors in their decision-making process. There may or may not be a recognition factor. The absence of recognition of a name itself has the capacity to inform, as does the fact that there is an absence of publicly available information. His assessment of the relevance of such matters in the case of the identity of the purchaser under the PSAs is logical and persuasive.

[451] I am therefore satisfied having regard to Mr Bowers' evidence that the Purchaser Identity Information was information that a reasonable person would expect to have a material effect on the price or value of Antares shares and that the statutory materiality test is satisfied. I am satisfied that the Purchaser Identity Information was material in that it would have been likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of Antares shares during the Relevant Period.

[452] Turning to ASIC's case based on the Cumulative Information, it is important to note that Mr Bowers considered the hypothetical impact of disclosure of the information in a cumulative manner. For example, the relevance of whether or not there had been due diligence was heightened by the absence of knowledge of the identity of the purchaser. Mr Bowers carefully explained the reasons why in his view many Relevant Investors would have assumed that there had been a process of due diligence undertaken - the definite approaching settlement date; the executed PSAs; and the absence of any deposit or default terms. Mr Bowers was not challenged on the relevance of such matters and I accept his evidence.

[453] So too the question of the impact of hypothetical disclosure of the facts reflected by the Funding Email were considered in the context of the non-disclosure of the other identified information. I agree with Mr Bowers that an inference is to be drawn, as I have addressed above, and the Funding Email reveals, that Wade Energy did not have all of its necessary finance in place for completion under the Big Star PSA as at 6 September 2015. Mr Bowers' explanation that such information would introduce an element of conditionality upon completion that is not otherwise exposed by the PSA Announcements is credible and logical. Having regard to the task of assessing the prospects of completion, a task that the vast majority of Relevant Investors would undertake in accordance with the framework as explained by Mr Bowers, the relevance of such information is readily apparent. It would introduce doubt about completion.

[454] I am therefore satisfied having regard to Mr Bowers' evidence that the Cumulative Information was information that a reasonable person would

expect to have a material effect on the price or value of Antares shares and that the statutory materiality test is satisfied. I am satisfied that the Cumulative Information was material in that it would have been likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of Antares shares during the Relevant Period.

[455] It follows that I am satisfied that Antares contravened s 674(2) of the *Corporations Act* during the Relevant Period by failing to comply with Listing Rule 3.1 by not notifying the ASX that Wade Energy was the purchaser under the PSAs.

[456] Further, I find that Antares contravened s 674(2) of the Corporations Act during the Relevant Period by failing to comply with Listing Rule 3.1 by not notifying the ASX of the following cumulative information:

(a) that Wade Energy was the purchaser under the PSAs;

(b) that Antares had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete under the PSAs; and

(c) that Antares had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase of the Big Star Assets.

17 Having regard to ASIC's claims that Mr Cruickshank breached the duty imposed on him as a director under s 180(1) of the Act, the primary judge made the following relevant findings:

[520] Considering the position as at the start of the Relevant Period, Mr Cruickshank can be taken to have known (at least) the terms of the PSAs which he signed, that the main assets of Antares were the subject of those agreements and the financial position of the company including the liabilities by way of the convertible notes. Based on the 2015 half yearly report, Mr Cruickshank can be taken to have known the significance of the completion of the PSAs to the ongoing financial position of the company and the material uncertainty identified by Ernst & Young as auditors. I am satisfied that, as a member of Antares' audit and compliance committee, and having regard to his responsibility for ASX announcements, he knew of the continuous disclosure obligations under the Listing Rules. He knew or ought to have known about Listing Rule 3.1 and Guidance Note 8. He knew of the Purchaser Identity Information, the Incomplete Financing Approval Information and the Absence of Independent Verification Information, as I have found in Part F, and I am satisfied that he knew such information was not generally available.

[521] More particularly, I am satisfied that Mr Cruickshank knew that unless that information was exempt from disclosure under an exception to Listing Rule 3.1, then Antares was obliged to disclose it if a reasonable person would expect the information to have a material effect on the price or value of share in Antares. I am also satisfied that, based on his experience, Mr Cruickshank would have appreciated that any failure by Antares to comply with its continuous disclosure obligations could expose it to financial harm including by way of liability for a penalty.

…

[525] I am also satisfied that a person in Mr Cruickshank's position exercising reasonable care and diligence would have recognised that the Cumulative Information would have been likely to influence investors in deciding whether to hold or sell their shares or whether to acquire new shares. The information that there had been a lack of due diligence about Wade Energy's capacity to complete and the information about the incomplete financing of the Big Star transaction at the time of the First PSA Announcement were both pieces of information that were objectively relevant to the assessment by an investor of the risk of completion. If Mr Cruickshank failed to understand the significance of that information, it would seem he failed to understand the apparent risks to Antares as vendor that the proposed purchaser might default under the PSAs, or failed to consider the ramifications if finance were not available. A reasonable person in Mr Cruickshank's position, absent some other comfort (as to which there was no evidence), would have been concerned about the indication that finance was not in place for Big Star and would have carefully considered and understood that such information was material to the market.

[526] Mr Bowers' evidence explained the objective force of the Cumulative Information and its impact on the assessment of value and completion risk. In my view, a reasonable person in Mr Cruickshank's position would have appreciated that an investor may be more nervous or cautious about the prospect of completion and, it follows, the receipt of the settlement proceeds, if they were provided with the Cumulative Information. Their perception of risk would be affected. Therefore, it follows, such a person would have appreciated that the Cumulative Information was of a nature that would or was likely to influence investors in deciding whether to acquire or dispose of shares.

[527] Nor would such a person have understood the responses and inquiries made by the ASX during the balance of the Relevant Period to have indicated that the disclosure by the PSA Clarification Announcement met the concerns as to disclosure about the identity of the purchaser or due diligence raised by the ASX.

[528] Therefore, I am satisfied to the requisite standard that Mr Cruickshank failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether Antares was required to disclose the Purchaser Identity Information or, further, the Cumulative Information and so in causing or otherwise permitting Antares to fail to disclose the information to the ASX.

PENALTY JUDGMENT

18 The primary judge, in the Penalty Judgment, made declarations that the Company contravened s 674(2) of the Act during the Relevant Period by failing to comply with Listing Rule 3.1 of the ASX Listing Rules (**Listing Rules**) by failing to notify the ASX that Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the purchase and sale agreements (**PSAs**) for those assets.

19 The primary judge made a declaration that the Company, during the Relevant Period, failed to comply with Listing Rule 3.1 of the Listing Rules by failing to notify the ASX of the Cumulative Information that:

(a) Wade Energy was the purchaser of the of the assets known as the Northern Star Assets and Big Star Assets under the PSAs;

(b) the Company had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete under the PSAs; and

(c) the Company had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase of the assets known as the Big Star Assets.

20 The primary judge declared that Mr Cruickshank had contravened s 180(1) of the Act in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in considering whether the Company was required to disclose that Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs, and thereby caused or otherwise permitted the Company to fail to disclose that information to the ASX in contravention of s 674(2) of the Act.

21 The primary judge further declared that Mr Cruickshank contravened s 180(1) of the Act in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in considering whether the Company was required to disclose that:

(a) Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs;

(b) the Company had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete the purchase under the PSAs; and

(c) the Company had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase under the PSAs,

and thereby caused, or otherwise permitted, the Company to fail to disclose that information to the ASX in contravention of s 674(2) of the Act.

22 The primary judge ordered that Mr Cruickshank pay, pursuant to s 1317G of the Act, a pecuniary penalty in relation to the contraventions in the amount of $40,000.

23 The primary judge also disqualified Mr Cruickshank, pursuant to s 206C of the Act, from managing a corporation for a period of four years.

GROUNDS OF APPEAL

24 Mr Cruickshank now appeals the decision of the primary judge in the Liability Judgment and the orders and declarations made in the Penalty Judgment.

25 By Amended Notice of Appeal filed 9 May 2022 (**Amended Notice of Appeal**), Mr Cruickshank presses six grounds of appeal with detailed particulars. These six ground of appeal may be summarised as follows.

26 **Ground 1** – The primary judge erred in finding that:

(a) the Purchaser Identity Information; and

(b) the Cumulative Information,

was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the Company's shares.

27 **Ground 2** – The primary judge ought to have found that ASIC's allegation that the name of the purchaser was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the Company's shares, had not been established.

28 **Ground 3** – The primary judge ought to have found that ASIC's allegation that the Absence of Independent Verification Information was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the Company's shares, had not been established.

29 **Ground 4** – The primary judge erred in finding that Mr Cruickshank failed to exercise the requisite degree of care and diligence in assessing whether the Cumulative Information ought to have been disclosed, causing the Company to contravene the continuous disclosure obligations under s 674(2A) of the Act.

30 **Ground 5** – The primary judge:

(1) erred in finding that each of the Absence of Independent Verification Information, Incomplete Financing Approval Information and Purchaser Identity Information as

alleged by ASIC existed and, further or in the alternative, was information for the purposes of s 674(2A) of the Act;

(2) ought to have found that:

(a) it had not been established that the Absence of Independent Verification Information, as formulated by ASIC, had a clear or ascertainable meaning, further or alternatively, was information that existed at all, further or alternatively, was the information that existed on the topic of the prospective purchaser's capacity to complete the transactions;

(b) it had not been established that the Incomplete Financing Approval Information, as formulated by ASIC, had a clear or ascertainable meaning, further or alternatively, was information that existed at all, further or alternatively, was the information that existed on the topic of the circumstances pertaining to financing of the transaction by the prospective purchaser;

(c) it had not been established that the Purchaser Identity Information, as formulated by ASIC, being the words "Wade Energy Corporation", amounted to meaningful information in any substantive way, and further, to the extent it may be relevant, did not represent the information that existed on the topic of the identity of the prospective purchaser; and

(d) the information defined as Cumulative Information were each not information for the purposes of s 674(2A) of the Act.

31 **Ground 6** – The primary judge erred in imposing upon Mr Cruickshank a disqualification order pursuant to s 206C of the Act in respect to the contravention of s 180(1) of the Act.

MR CRUICKSHANK'S SUBMISSIONS

Ground 1

32 Mr Cruickshank submitted that materiality under s 677 of the Act primarily involves a common-sense test on a consideration of primary facts, although assistance may be derived from experts who professionally buy and sell shares in large tranches and make investment decisions of the kind contemplated by s 677: *Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5)* [2009] FCA 1586; 264 ALR 201; 76 ACSR 506 at [482].

33 At the liability trial, ASIC sought to prove materiality of the Cumulative Information through the expert evidence of Mr Bowers. Mr Cruickshank submitted that the primary judge erred in accepting Mr Bowers' evidence in its entirety. Mr Cruickshank submitted that Mr Bowers did not have the relevant speciality knowledge and that his evidence was not, wholly or substantially, based on that specialised knowledge.

34 Mr Cruickshank submitted that the primary judge was wrong to accept Mr Bowers' evidence as "logical and persuasive"; was wrong to be "satisfied having regard to Mr Bowers' evidence that the materiality test in s 674 was satisfied"; and was wrong to be "satisfied that the Purchaser Identity Information was material that would have been likely to influence relevant investors in deciding whether to acquire or dispose of [Company] shares during the relevant period": Liability Judgment [450] and [451]. That was so, in Mr Cruickshank's submission, for the following reasons.

35 First, Mr Bowers' expert evidence was unlikely to be wholly or substantially based on Mr Bowers' specialised knowledge. Mr Cruickshank submitted that Mr Bowers' evidence of investors' state of mind was based on speculation, supposition or Mr Bowers' personal view.

36 Second, as best as can be understood from the submissions, Mr Cruickshank submitted that Mr Bowers' evidence was not that the purchaser's name would have likely influenced investor decision making, rather investors would only be influenced if they did not recognise the purchaser's name and undertook independent inquiries to obtain information about the purchaser's background, and failed to find anything.

37 Third, assertions as to what investors would have done if the purchaser's name was initially announced were a combination of speculation, supposition, personal views and assumptions by Mr Bowers. Mr Cruickshank submitted that even if independent enquiries were made, and the results were in accordance with Mr Bowers' views, there was no basis for investors to expect to be familiar with specific names of private equity purchasers of oil or gas projects in Texas. Mr Cruickshank submitted that, as a matter of common sense, there is no basis to expect rational investors to be influenced by knowing a purchaser's name they are not familiar with, and which they would not have been expected to be familiar with. A reasonable person would therefore not expect that knowing the purchaser's name in this context would be likely to influence relevant investors.

38 Fourth, s 677 of the Act operates as a deeming provision. In Mr Cruickshank's submission, s 677 is to be construed strictly, and only for the purpose for which it was intended. In Mr Cruickshank's submission, it required consideration of the likely influence of the information and cannot be used to create a deemed consequence under s 674 of the Act on the basis of the likely influence or a combination of likely influence of information and the possible results of further steps that may be taken.

39 Mr Cruickshank submitted that ASIC's case as to the materiality of the Absence of Independent Verification Information, relied solely on Mr Bowers' evidence and required ASIC to prove that the state of mind of relevant investors was that the Company would have independently verified or otherwise determined the capacity of Wade Energy to complete the transaction: Concise Statement [19(e)]. Mr Cruickshank submitted that the primary judge was wrong not to uphold his objections that Mr Bowers did not have the specialist knowledge to give that evidence or that the evidence was not wholly or substantially based on that specialised knowledge. That was so, in Mr Cruickshank's submission, for the following reasons.

40 First, in Mr Cruickshank's submission, the Company did not announce at any time that it had undertaken independent verification or otherwise determined the capacity of Wade Energy to complete the transaction. In Mr Cruickshank's submission, ASIC had to establish in that circumstance, and in the absence of evidence of ordinary commercial practice, that investors would not deduct, infer or conclude that the Company had not done so. Mr Cruickshank submitted that Mr Bowers' expert evidence was based on speculation, supposition or his personal view.

41 Second, in Mr Cruickshank's submission, there was no evidence of ordinary commercial practice to undertake verification or determination of a purchaser's capacity to complete the transaction. In these circumstances, investors could not have had a reasonable expectation the Company had done so; nor was there evidence of a usual practice of notifying the market whether and what capacity verification had been undertaken.

42 Third, in Mr Cruickshank's submission, Mr Bowers' evidence that the verification or determination of the purchaser's capacity to complete the transaction was "strongly correlated" to the quantum of the purchase price, and in the circumstances of Wade Energy not being "… a readily identifiable entity…that might obviously have the potential financial capacity..." was not based on specialised knowledge: Mr Lee Bowers' expert report dated 26 November 2018

at [9.5] and [9.10] (**Bowers' Report**). Rather, in Mr Cruickshank's submission, this assertion was based on a combination of speculation, inference, personal views and assumptions of Mr Bowers.

43 Fourth, in Mr Cruickshank's submission, Mr Bowers' evidence did not establish any particular investor belief as to the extent vendors generally, or the Company specifically, would verify or determine capacity to complete. Mr Bowers asserted that investors would have believed or expected: "… at least some level of independent verification or due diligence…", and "…a reasonable level of independent verification or due diligence …', and "…some basic level of due diligence …": Bowers' Report at [9.10]-[9.14].

44 Fifth, in Mr Cruickshank's submission, Mr Bowers' expert evidence did not draw on observed experience or actual knowledge of the assumptions investors make. Mr Bowers' evidence was not based on observation or experience. Rather, it amounted to unsupported speculation on the state of mind of the relevant persons.

45 Sixth, in Mr Cruickshank's submission, s 677 of the Act operates as a deeming provision, it cannot extend to capture and attach to the particularised information an alleged state of mind.

46 Mr Cruickshank submitted that the primary judge erred in accepting Mr Bowers' evidence as establishing materiality of the Cumulative Information for the purposes of s 677 of the Act and in finding that the Cumulative Information was material for the purposes of s 674(2)(c)(ii) on the basis of the deeming provision s 677 of the Act. Mr Cruickshank submitted that it was necessary for the primary judge to consider and determine whether the facts on which Mr Bowers' evidence depended were established and whether the Company knew the alleged facts. Mr Cruickshank submitted that the primary judge ought to have concluded that the facts were not proved and that Mr Bowers' evidence ought not be accepted and, as a consequence, the deeming provision s 677 did not enable the case against the Company to be made out.

Ground 2

47 Mr Cruickshank submitted that the primary judge's finding that the name of the purchaser was information that a reasonable person would expect, if it were generally available, to have a material effect on price or value of the Company's shares was in error.

48 Mr Cruickshank submitted that Mr Bowers' evidence fell into two categories:

(1) generalised expressions of opinion as to investor behaviour and how information may influence investors; and

(2) unlikely detail and improbable precision based on a combination of speculation, supposition, inference, personal views and assumptions.

49 Mr Bowers' evidence, in Mr Cruickshank's submission, strayed well beyond Mr Bowers' field of expertise and his experience, and should not have been accepted by the primary judge.

50 Mr Cruickshank submitted that non-disclosure of the purchaser's name was an insufficient basis to give rise to the serious consequences of a contravention of s 674 of the Act.

Ground 3

51 Mr Cruickshank submitted that, absent findings as to the state of mind of investors, the primary judge ought to have found that ASIC's allegation that the Absence of Independent Verification Information had not been established and was not sufficient to satisfy s 674(2) of the Act.

52 Mr Cruickshank submitted that the evidence Mr Bowers gave in relation to this issue was unlikely to have a material foundation in any actual observations or experience of investor behaviour.

53 Mr Cruickshank submitted that the evidence Mr Bowers gave on this issue was improbable or improbably viewed against the ordinary business behaviour that reasonably may be expected of a vendor in receipt of an offer; or alternatively, of a vendor in receipt of an offer and no competing offers, to purchase an asset the vendor wanted to sell.

54 Mr Cruickshank submitted that the evidence Mr Bowers gave on this issue was more likely to be a product of Mr Bowers unintentionally taking into consideration personal assumptions and for that reason, Mr Bowers' evidence on this issue ought not have been accepted by the primary judge.

Ground 4

55 Mr Cruickshank submitted that the primary judge erred in treating the matters alleged by ASIC as "information" and ought to have made the findings particularised in paragraph 5.2 of the Amended Notice of Appeal. Broadly, they were to the effect that the 'information' identified by ASIC was not logically capable of constituting information, or 'meaningful information', and was not information for the purposes of s 674(2A) of the Act.

Ground 5

56 Mr Cruickshank submitted that the primary judge's finding of breach of duty under s 180(1) of the Act ought not to have been made by the primary judge as Mr Bowers, whose evidence the finding was based on, did not have the requisite specialist knowledge to give that evidence.

57 Mr Cruickshank submitted that there was no basis to conclude that a person in his position would have known, or could be taken to have known, the matters asserted by Mr Bowers in his evidence in relation to the significance of the name of the purchaser or the other matters that underpinned the significance of the purchaser's name.

58 Mr Cruickshank submitted that it was not open to the primary judge to conclude that Mr Cruickshank had breached s 180(1) of the Act. This is because there was an insufficient basis to conclude that a reasonable person would arrive at the same conclusions that Mr Bowers did in his evidence.

59 Mr Cruickshank submitted that in the circumstances of this case, it was necessary for ASIC to put on evidence of the reasonable standard that would be observed by a director in the position of Mr Cruickshank.

60 Mr Cruickshank submitted that the primary judge erred in placing significant weight on the absence of evidence that Mr Cruickshank obtained legal advice in relation to the Company's continuous disclosure obligations.

Ground 6

61 Mr Cruickshank submitted that the primary judge erred in imposing upon him a disqualification order pursuant to s 206C of the Act in respect to the contravention of s 180(1) of the Act.

62 Mr Cruickshank submitted that the primary judge erred in not determining the pecuniary penalty before the disqualification order.

63 Mr Cruickshank submitted that the primary judge failed to take into consideration the period that had lapsed between the impugned events which took place in 2015 and the findings of contravention in October 2020, the penalty hearing in February 2021 and the Penalty Judgment delivered in December 2021, in the assessing the disqualification order.

64 Mr Cruickshank submitted that, if a disqualification order was to be made, the primary judge ought to have taken the period of time which had already lapsed between the impugned events

and the date of the disqualification order into consideration when making the disqualification order.

ASIC'S SUBMISSIONS

Grounds 1, 2 and 3

65 ASIC submitted that Grounds 1 to 3 may conveniently be dealt with together as a question of materiality of the Cumulative Information.

66 ASIC submitted that the primary judge was correct to accept the expert evidence of Mr Bowers and to make a finding that the Cumulative Information was information that a reasonable person would expect, if generally available, to have a material effect on price or value of the Company.

67 ASIC submitted that the primary judge was correct to find at [240] in the Liability Judgment that Mr Bowers appropriately addressed the issue of whether a reasonable person would have expected there to be a material effect on the price or value of the Company if the Cumulative Information was generally available.

68 The only expert evidence at the liability trial was Mr Bowers' Report. Mr Cruickshank adduced no expert evidence on materiality.

69 ASIC submitted that Mr Bowers' Report identified the persons he would have expected would commonly invest in securities of listed corporations and described how such investors typically determined whether to acquire or dispose of securities. In ASIC's submission, Mr Bowers identified a number of different investor types, levels of sophistication and the investment practices across those groups. Mr Bowers then addressed whether knowledge of the identity of the purchaser and the Cumulative Information, if that information had been generally available, would have been likely to influence relevant investors in deciding whether to acquire or dispose of the Company's shares.

70 ASIC submitted that contrary to the contentions of Mr Cruickshank, ASIC was not required to prove the "state of mind" of investors nor prove that investors knew particular facts. The test in s 674(2)(c)(ii) and consequently in s 677 of the Act is wholly objective.

71 ASIC submitted that the primary judge correctly found that Mr Bowers was eminently qualified to give expert evidence on materiality: Liability Judgment [427] and [428]. ASIC submitted

that Mr Bowers had extensive experience with institutional and retail investors, particularly with respect to mining and exploration securities. ASIC submitted that the primary judge was correct to find that Mr Bowers drew on his experience and specialised knowledge in the field in order to provide his expert opinions: Liability Judgment [438].

72 In ASIC's submission, there is no occasion to disturb the primary judge's exercise of judgment in ruling Mr Bowers' Report admissible and placing weight on it. Mr Bowers' evidence was that, from his perspective, there was no doubt that the correct position in this case was that the identity of the purchaser should have been disclosed: Liability Judgment [164].

73 ASIC submitted that Mr Cruickshank's submissions concerning likely investor expectations regarding independent verification and due diligence, pay insufficient regard to the totality of Mr Bowers' reasoning in support of his opinion that relevant investors would have an expectation that the Company would have undertaken independent verification or due diligence in relation to Wade Energy's capacity to complete. Mr Bowers' evidence was to the effect that, in circumstances where the quantum of the transaction was significant and the purchaser lacked a readily identifiable entity or individual name, the failure of the Company to independently verify or otherwise determine the capacity of Wade Energy to complete either of the PSAs would have been highly relevant to the estimated likelihood of completion.

74 ASIC submitted that Mr Cruickshank's complaints about the Incomplete Financing Approval Information were misconceived. That was because, in ASIC's submission, Mr Bowers' evidence was not directed to proving that the entirety of the investor class would be relevantly influenced. It is sufficient that a component of the relevant investor class was relevantly influenced for the purposes of s 677 of the Act.

Ground 4

75 ASIC submitted that Mr Cruickshank's challenge to ASIC's "conceptualisation" of the information, which it alleged ought to have been disclosed by the Company, must be rejected. That is so, because in ASIC's submission, the information is precisely defined in the Concise Statement and was "information" for the purposes of s 674(2) of the Act.

76 ASIC submitted that the Purchaser Identity Information, the Incomplete Financing Approval Information and Absence of Independent Verification Information was readily capable of being

understood, and supplying a foundation for a finding of contravention of s 674(2) of the Act: Concise Statement at [5], [14] and [17(a)].

77 ASIC submitted that, in the present case, Mr Cruickshank did not make an application for the matter to proceed by way of statement of claim, did not strike out the Concise Statement on the basis that it did not provide him with fair notice of the case against him and did not utilise other cooperative procedural mechanisms to address any perceived lack of clarity in the allegations framed.

Ground 5

78 ASIC submitted that the primary judge correctly held that Mr Cruickshank contravened s 180(1) of the Act. ASIC submitted that, in discharging its burden under s 180(1), ASIC was not required to prove that a reasonable director would perceive precisely how a continuous disclosure case may ultimately be formulated against the Company. Rather, in ASIC's submission, in a case such as the present, liability under s 180(1) arises in circumstances where it can be shown that the director's failure to exercise reasonable care and diligence has caused, or allowed, the Company to contravene the Act, at least where it is reasonably foreseeable that such a contravention might harm the Company's interests. In ASIC's submission, the primary judge reached the conclusion that Mr Cruickshank had fallen short of the standard of care expected of a reasonable director, not on the basis that he ought to have been aware of the detailed analysis ultimately undertaken by Mr Bowers, but because his actions fell short of the requisite standard of care and diligence in a number of specific respects. Those actions resulted in the contraventions of the continuous disclosure provisions in circumstances where it was reasonably foreseeable that such a contravention might harm the Company's interests.

79 ASIC submitted that these findings against Mr Cruickshank were plainly open to be made on the evidence. ASIC observed that Mr Cruickshank did not give evidence, and the primary judge drew an adverse inference against him (Liability Judgment at [293]-[297]), which is not challenged on appeal.

80 ASIC submitted that Mr Cruickshank's contention that ASIC was required to lead evidence from an expert witness as to the "reasonable standard that would be observed by a director in the position of Mr Cruickshank" must be rejected. In ASIC's submission, the primary judge was correct to observe that while there are cases in which a breach of s 180(1) of the Act has been proved by reference to expert evidence from professional directors or officers, courts

regularly identify breaches of s 180(1) in the absence of such evidence. In the present case, ASIC submitted that there is ample evidentiary foundation to reach the conclusion that Mr Cruickshank contravened s 180(1) of the Act.

Ground 6

81 ASIC submitted that the primary judge was correct to adopt the "long standing practice" of considering disqualification before a civil penalty. In ASIC's submission, the primary purpose of disqualification orders is the protection of the public, while the primary purpose of a pecuniary penalty is to act as a personal deterrent and a deterrent to the general public against repetition of like conduct.

82 ASIC submitted that Mr Cruickshank's contention that the primary judge ought to have considered the time which lapsed between the impugned offence and the disqualification order ought to be rejected. This, in ASIC's submission, was not a case in which Mr Cruickshank was subject to an extant disqualification order while the matter was being heard and determined. Nothing prevented Mr Cruickshank from continuing to serve as a director from the time of the contraventions until December 2021.

STATUTORY AND REGULATORY FRAMEWORK

83 The obligation of continuous disclosure under s 674 of the Act is to achieve a well-informed market, leading to greater investor confidence. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information: *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332 at [353]-[355] (Spigelman CJ, Beazley and Giles JJA); and *Grant-Taylor v Babcock & Brown Limited (in liq)* [2016] FCAFC 60; 330 ALR 642; 113 ACSR 362; 245 FCR 402 at [92] (Allsop CJ, Gilmour and Beach JJ) (***Grant-Taylor***) and Liability Judgment at [50].

84 The ASX publishes and maintains the Listing Rules. The Listing Rules apply to all entities admitted to the ASX Official List. The Listing Rules provide that an entity must comply with the Listing Rules as interpreted:

(a) in accordance with their spirit, intention and purpose;

(b) by looking beyond form to substance; and

(c) in a way that best promotes the principles on which the Listing Rules are based: Listing Rule 19.2.

85 The disclosure requirements within the Listing Rules have statutory force by s 674 of the Act. The Listing Rules applied to the Company, as it was at all times a listed disclosing entity: *Grant-Taylor* at [50] and Liability Judgment [52].

86 The ASX published Guidance Note 8 to assist listed entities to understand and comply with their disclosure obligations under Listing Rules 3.1, 3.1A and 3.1B. Guidance Note 8 does not have statutory force, but the ASX states in the note that it reflects the ASX's position as to how the law is intended to operate.

87 Reproduced below are the relevant extracts of the Act, Listing Rules and Guidance Note 8.

88 Section 674 of the *Corporations Act* provided at the relevant time:

> **Continuous disclosure - listed disclosing entity bound by a disclosure requirement in market listing rules**
>
> *Obligation to disclose in accordance with listing rules*
>
> (1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.
>
> (2) If:
>
> (a) this subsection applies to a listed disclosing entity; and
>
> (b) the entity has information that those provisions require the entity to notify to the market operator; and
>
> (c) that information:
>
> (i) is not generally available; and
>
> (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;
>
> the entity must notify the market operator of that information in accordance with those provisions.
>
> Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).
>
> Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 3: An infringement notice may be issued for an alleged contravention of this subsection, see section 1317DAC.

(2A) A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 2: Section 79 defines involved.

(2B) A person does not contravene subsection (2A) if the person proves that they:

(a) took all steps (if any) that were reasonable in the circumstances to ensure that the listed disclosing entity complied with its obligations under subsection (2); and

(b) after doing so, believed on reasonable grounds that the listed disclosing entity was complying with its obligations under that subsection.

(3) For the purposes of the application of subsection (2) to a listed disclosing entity that is an undertaking to which interests in a registered scheme relate, the obligation of the entity to notify the market operator of information is an obligation of the responsible entity.

(4) Nothing in subsection (2) is intended to affect or limit the situations in which action can be taken (otherwise than by way of a prosecution for an offence based on subsection (2)) in respect of a failure to comply with provisions referred to in subsection (1).

…

89 Section 676 provides:

Sections 674 and 675 - when information is generally available

(1) This section has effect for the purposes of sections 674 and 675.

(2) Information is generally available if:

(a) it consists of readily observable matter; or

(b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:

(i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and

(ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

(3) Information is also generally available if it consists of deductions, conclusions

or inferences made or drawn from either or both of the following:

(a) information referred to in paragraph (2)(a);

(b) information made known as mentioned in subparagraph (2)(b)(i).

90 Section 677 provides:

> **Sections 674 and 675 - material effect on price or value**
>
> For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

91 The Listing Rules have been amended from time to time. Listing Rules 3.1 and 3.1A that applied at the relevant time are as follows:

> **Immediate notice of material information**
>
> **General rule**
>
> 3.1 Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.
>
> Introduced 01/07/96 Origin: Listing Rule 3A(1) Amended 01/07/00, 01/01/03, 01/05/13
>
> Note: Section 677 of the Corporations Act defines material effect on price or value. As at 1 May 2013 it said for the purpose of sections 674 and 675 a reasonable person would be taken to expect information to have a material effect on the price or value of securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell, the first mentioned securities.
>
> 'Information' may include information necessary to prevent or correct a false market, see Listing Rule 3.1B. It may also include matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market, and matters relating to the intentions, or likely intentions, of a person (see Listing Rule 19.12).
>
> A confidentiality agreement cannot prevent an entity from complying with its obligations under the Listing Rules and, in particular, its obligation to give ASX information for release to the market where required by the Listing Rules.
>
> Examples: The following are non-exhaustive examples of the type of information that, depending on the circumstances, could require disclosure by an entity under this rule:
>
> - a transaction that will lead to a significant change in the nature or scale of the entity's activities (see also Listing Rule 11.1 and Guidance Note 12 Significant Changes to Activities);

- a material mineral or hydro-carbon discovery;
- a material acquisition or disposal;
- the granting or withdrawal of a material licence;
- the entry into, variation or termination of a material agreement;
- becoming a plaintiff or defendant in a material law suit;
- the fact that the entity's earnings will be materially different from market expectations;
- the appointment of a liquidator, administrator or receiver;
- the commission of an event of default under, or other event entitling a financier to terminate, a material financing facility;
- under subscriptions or over subscriptions to an issue of securities (a proposed issue of securities is separately notifiable to ASX under listing rule 3.10.3);
- giving or receiving a notice of intention to make a takeover; and
- any rating applied by a rating agency to an entity or its securities and any change to such a rating.

Cross-reference: Listing Rules 3.1A, 3.1B, 5.18, 15.7, 18.7A, 19.2, Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1-3.1B*.

Exception to rule 3.1

3.1A Listing rule 3.1 does not apply to particular information while each of the following is satisfied in relation to the information:

3.1A.1 One or more of the following 5 situations applies:

- It would be a breach of a law to disclose the information;
- The information concerns an incomplete proposal or negotiation;
- The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
- The information is generated for the internal management purposes of the entity; or
- The information is a trade secret; and

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and

3.1A.3 A reasonable person would not expect the information to be disclosed.

Introduced 01/01/03 Amended 01/05/13

Cross-reference: Listing Rules 3.1, 3.1B, 18.8A; Guidance Note 8 *Continuous Disclosure: Listing Rules 3.1-3.1B.*

92 Listing Rule 19 relates to matters of interpretation and definition. Relevantly, r 19.1 and r 19.2 (including notes) provided at the relevant time:

> **Interpretation**
>
> **Principles on which the listing rules are based**
>
> 19.1 The listing rules are based on the principles set out in the Introduction.
>
> Introduced 1/7/96.
>
> **Entity must comply with spirit, intention and purpose etc of rules**
>
> 19.2 An entity must comply with the listing rules as interpreted:
>
> - in accordance with their spirit, intention and purpose;
> - by looking beyond form to substance; and
> - in a way that best promotes the principles on which the listing rules are based.
>
> Introduced 1/7/96. Origin: Foreword.
>
> Note: The principles on which the listing rules are based embody their intention and purpose. See the Introduction.

93 Listing Rule 19.12 (definitions) is also relevant. It relevantly provided at the material time that the expression "aware" has the following meaning:

> an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

94 Listing Rule 19.12 defined "information" as follows:

> for the purposes of Listing Rules 3.1 [and] 3.1B, information includes:
>
> (a) matters of supposition and other matters that are insufficiently definite to warrant disclosure to the market; and
>
> (b) matters relating to the intentions, or likely intentions, of a person.

95 The relevant extract of Guidance Note 8 is cl 4.15 which states in part:

> **4.15 Guidelines on the contents of announcements under Listing Rule 3.1**
>
> Wherever possible, an announcement under Listing Rule 3.1 should contain sufficient detail for investors or their professional advisers to understand its ramifications and to assess its impact on the price or value of the entity's securities.
>
> For example, depending on the circumstances, an announcement about the signing of a contract relating to a significant acquisition or disposal might include information about:
>
> - the parties to the contract;

- the assets or businesses proposed to be acquired or disposed of;
- any material conditions that need to be satisfied before the agreement becomes legally binding or proceeds to completion;
- the likely effect of the transaction on the entity's total assets, total equity interests, annual revenue (or, in the case of a mining exploration entity or other entity that is not earning material revenue from operations, annual expenditure) and annual profit before tax and extraordinary items;
- any issue of securities proposed as part of, or in conjunction with, the transaction, including its effect on the total issued capital of the entity and the purposes for which the funds raised will be used;
- any changes to the board or senior management proposed as a consequence of the transaction; and
- the timetable for implementing the transaction.

(footnotes omitted)

96 In the Liability Judgment at [64] and [65], the primary judge identified the following elements that ASIC must prove to establish a contravention of s 674(2) of the Act:

(a) there was information about specified events or matters within the meaning of Listing Rule 3.1 and s 674(2)(b);

(b) the Company had that information (s 674(2)(b)) and was aware of it (Listing Rule 3.1);

(c) the information was not generally available (s 674(2)(c)(i)); and

(d) a reasonable person would have expected that information to have had a material effect on the price or value of the shares in the Company, if it had been generally available (s 674(2)(c)(ii); Listing Rule 3.1).

97 Relevant to (d), above, is the deeming provision in s 677 of the Act, that is, whether persons who commonly invest in securities would be influenced in their investment decisions by such information.

CONSIDERATION

Grounds 1 to 3 – Materiality

98 Mr Cruickshank, by Grounds 1 to 3, challenges the primary judge's finding that the Purchaser Identity Information and the Cumulative Information were each information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the Company's shares for the purposes of s 674(2)(c)(ii) and s 677 of the Act.

99 ASIC, at the liability trial before the primary judge, sought to prove materiality of the Purchaser Identity Information and Cumulative Information by the expert opinion evidence of Mr Bowers. Mr Cruickshank objected to the admission into evidence of Mr Bowers' Report on the basis that Mr Bowers did not have the relevant specialised knowledge to be able to express an opinion on investor behaviour and how information may influence persons who commonly invest in securities. We turn first to consider the questions which Mr Bowers was asked by ASIC to express an expert opinion. Those questions were as follows:

(1) Question 1 – Describe the persons you would have expected to have commonly invested in securities of listed corporations in Australia in the period between 7 and 15 September 2015 (the persons that you have identified in answer to this question are collectively referred to in the following questions as Relevant Investors)?

(2) Question 2 – In the period between 7 and 15 September 2015, how did Relevant Investors typically determine whether to acquire or dispose of securities of listed corporations in Australia?

(3) Question 3 – What statements made or information disseminated by the Company or a listed corporation of a kind similar to the Company would be likely to influence Relevant Investors in deciding whether to acquire or dispose of securities of the Company or listed corporations of a kind similar to the Company in the period between 7 and 15 September 2015?

(4) Question 4 – In the period between the release of the first PSA announcement at or about 8.27 a.m. AEST on 7 September 2015 and the suspension of the Company from official quotation by the ASX at or about 11.58 a.m. AEST on 15 September 2015, would knowledge of the identity of the purchaser of the Northern Star Assets and the Big Star Assets, if that information had been generally available, have been likely to influence Relevant Investors in deciding whether to acquire or dispose of the Company's securities?

(5) Question 5 – In the period between the release of the first PSA announcement at or about 8.27 a.m. AEST on 7 September 2015 and the suspension of the Company from official quotation by the ASX at or about 11.58 a.m. AEST on 15 September 2015, would knowledge of cumulatively:

    (a) the identity of the purchaser of the Northern Star Assets and the Big Star Assets;

(b) that the Company had not independently verified or otherwise determined, as at the respective times that each of the PSA Announcements and the Company's response was made, the capacity of Wade Energy to complete either of the Northern Star PSA or the Big Star PSA;

(c) that on or about Sunday, 6 September 2015, Wade Energy had informed the Company that it had only received approval for its secondary lender for the purchase of the Northern Star Assets and that while it was working on another secondary lender for the purchase of the Big Star Assets it would not know anything on that issue until the middle of the forthcoming week; and

(d) if that information had been generally available, had been likely to influence Relevant Investors in deciding whether to acquire or dispose of the Company's securities?

100 Mr Bowers was cross-examined as to his experience and specialised knowledge. An examination of the transcript reveals the following:

(1) Mr Bowers' first job was as an equity analyst in 2003. For the next 15 years, Mr Bowers interacted with high net worth individuals who invested in the stock market: T241.22-45.

(2) Mr Bowers' Report is based on his experience and interaction in the broader stockbroking industry and his understanding from those who operate within that industry. Mr Bowers' opinion is also based on his training, experience and expertise: T242.15-25.

(3) Mr Bowers worked at Macquarie Bank and the Royal Bank of Canada as an analyst, as well as in specialist mining equities sales and trading roles. Mr Bowers predominantly focused on institutional professional investor clients. In those roles, Mr Bowers occasionally interacted with retail investors: T243.42-244.16.

(4) Mr Bowers also worked as a boutique corporate adviser and equity markets consultant. In this role, Mr Bowers advised corporate clients, predominantly mining and exploration companies, on likely investor reaction and share price movements in relation to potential announcements of new pieces of information: T251.45.

(5) Mr Bowers has had many discussions with investors about equity values and why they purchased and sold particular securities: T257.20-25.

(6) Mr Bowers described how new information can change the valuation of securities: T259.5-26.

(7) Mr Bowers described how new information that comes to light regularly forces people to alter their decision-making on value. Markets are not perfectly efficient, and as a result, there are periods of time where the acknowledgement or recognition of those value differentials can take a bit longer: T261.30-38.

(8) Mr Bowers' opinion is based on being 'in a room' with retail stockbrokers and institutional sales people. Mr Bowers has spent a large amount of his professional existence listening to these conversations and engaging in them himself. Mr Bowers' experience in listening to conversations by professional advisers giving, in some cases, advice to professional investors and, in some cases, to relatively unsophisticated investors: T272.31-46.

101 Mr Bowers in his Report at [1.1] to [1.7] explains his professional qualifications and his professional experience.

102 The primary judge made the following findings in relation to Mr Bowers' qualifications and specialised knowledge at [332]-[337] of the Liability Judgment:

> [332] Mr Bowers holds Bachelor of Commerce and Bachelor of Laws degrees from The University of Western Australia. His professional experience encompasses nine years as a mining equities analyst for Macquarie and Royal Bank of Canada; approximately one year in a specialist mining equities sales and trading role for Macquarie; and approximately five years as a boutique corporate advisor and equity market consultant in his own business partnership. He also has experience in mining equities research. Such experience includes approximately two years as the Head of Australian Mining Research at Macquarie.
>
> [333] Mr Bowers explained that his core role as a mining equities analyst involved ongoing coverage and evaluation of ASX listed Australian mining and exploration companies as investment prospects. His role included publishing detailed company analysis and evaluations. His core role as a specialist mining equities salesperson involved interaction with institutions and investor clients in relation to investment advice, trading strategy, issue of offerings and broader market flows and observations.
>
> [334] In general terms the aspect of both roles was impact analysis, including likely share valuation and price movement and market trading dynamics stemming from new information or factors. Both roles provided direct and regular interaction with a wide spectrum of investors in the Australian equity market including extensive exposure to different investment processes and trading decision-making criteria.
>
> [335] Mr Bowers said that his expertise was centred on investment analysis and

> trading dynamics in ASX listed equities, most particularly mining and exploration companies, including asset evaluation, corporate and asset benchmarking, new informal price/value impact and sensitivity analysis, investment advice and trading strategy and the investment processes and trading decision-making criteria of a wide range of Australian market investors.
>
> [336] Mr Bowers said that one of the key aspects of his role as a boutique corporate advisor and equity market consultant is advising corporate clients, predominately mining and exploration companies, on likely investor reaction and share price movements in relation to the potential announcement of new pieces of information.
>
> [337] Mr Bowers summarised his experience as 15 years of direct interaction with institutional and retail investors, the core of which being detailed discussion on the assets bases, growth prospects, management teams, shareholder registers and investment merits (including valuations) of various companies listed on the ASX. This interaction has taken many forms including physical meetings, telephone conversations, email exchanges, group presentations, requested bespoke analysis preparation and general research reports. He explained that through this interaction, he has made extensive observations of the various investment processes and trading decision-making of wide ranging investor groups and individuals and has gained insight in that regard.

103 The "specialised knowledge" which was relevant to the five questions asked by ASIC was "knowledge of how investors in listed securities react to information and specifically to new information in deciding whether to acquire or dispose of listed securities".

104 The primary judge was required to make an assessment as to whether Mr Bowers possessed this relevant specialised knowledge. The primary judge at [417]-[428] of the Liability Judgment considered Mr Bowers' expertise and experience and concluded that Mr Bowers was eminently qualified to give the evidence that he had given. Our analysis of Mr Bowers' Report and the transcript of his cross-examination revealed no error on the part of the primary judge in accepting that Mr Bowers had the relevant specialised knowledge to answer the five questions that ASIC asked of him. There appears to be ample evidence to found her Honour's conclusions.

105 By Ground 1, Mr Cruickshank takes issue with the primary judge's finding that the Purchaser Identity Information and the Cumulative Information were each information that a reasonable person would expect, if it were generally available, to have a material effect on the price of the Company's shares. By Grounds 2 and 3, Mr Cruickshank alleges that the primary judge ought to have found that those matters were not established.

106 The findings of the primary judge that the Purchaser Identity Information and the Cumulative Information would have a material effect on the price or value of the Company's shares were based on the opinions expressed in Mr Bowers' Report and his expert evidence. Mr Cruickshank adduced no expert evidence on materiality.

107 The primary judge observed at [445] of the Liability Judgment that the substance of Mr Bowers' expert evidence as to materiality of particular information was not in any real sense challenged by Mr Cruickshank.

108 We now turn to consider the question of materiality with respect to each of the Purchaser Identity Information, the Absence of Independent Verification Information and Incomplete Financing Approval Information.

Materiality of Purchaser Identity Information

109 Mr Bowers' opinion was that the knowledge of the identity of the purchaser of the Northern Start Assets and the Big Star Assets would have been likely to influence relevant investors in deciding whether to acquire or dispose of the Company's shares during the Relevant Period for the following reasons:

(1) Failure to disclose the purchaser meant that there was little ability to ascertain the capability or otherwise of the purchaser to meet its contractual obligations: Mr Bowers' Report at [8.39.1].

(2) Given the magnitude of the aggregate sale proceeds for the Northern Star Assets (US$148 million) and Big Star Assets (US$105 million) relative to the market capitalisation of the Company at the time (US$21.6 million), a substantial proportion of relevant investors would be expected to arrive at a risk-weighted equity value for the Company's shares that is substantially above the prevailing share price: Mr Bowers' Report at [8.44].

(3) The PSA Announcements contained very limited information in relation to the counterparty to the purchase and sale agreements over the Northern Star Assets and Big Star Assets. Identification of the counterparty is limited to their very general description as a "private equity purchaser": Mr Bowers' Report at [8.73].

(4) Knowledge of the identity of the purchaser is significant in the context of the PSA Announcements. The key reason for this is that it goes to the very heart of the

purchaser's ability, and possibly intent, to complete the Northern Star PSA and the Big Star PSA. This is predominantly as a result of the substantial quantum of the total purchase consideration. Knowledge of the identity of the purchaser allows relevant investors to be more decisive, positively or negatively, on the specific question of the purchaser's likelihood of completing the agreements: Mr Bowers' Report at [8.75].

(5) Knowing that Wade Energy was the purchaser is likely to see the average level of caution exercised by relevant investors rise significantly for two reasons. First, the relevant investors, and even sophisticated investors, are not likely to be familiar with Wade Energy or the identity of its board members, key management or large shareholders. Second, very few details about Wade Energy that are meaningful to relevant investors are available in the public arena. There are no references to Wade Energy in any of the articles published by the Australian media in the period from 1 September 2014 to 15 September 2015. There are also no references to Wade Energy in any online investment forums: Mr Bowers' Report at [8.77]-[8.78].

(6) Limited publicly available information on, or evidence of, considerable financial backing/capability or a track record of completing agreements of the quantum anywhere near those contemplated by the PSA Announcements is far from conclusive evidence that Wade Energy would be unable to complete. It would certainly increase the level of caution exercised by relevant investors in relation to the likelihood of completion: Mr Bowers' Report at [8.79].

(7) The combination of these two drivers (the absence of recognition of Wade Energy and lack of information about Wade Energy) is likely to see the average level of caution exercised by relevant investors rise significantly with the knowledge that Wade Energy is the purchaser: Mr Bowers' Report at [8.80].

(8) Knowledge of the identity of the purchaser would have significantly impacted or diminished the estimated likelihood of the Northern Star PSA and/or Big Star PSA being completed in the eyes of the relevant investors. This would have the direct impact of significantly lowering the risk weighted and valuations for the Company arrived at by many relevant investors after the release of the first PSA Announcement and then subsequently after the release of the PSA Clarification Announcement: Mr Bowers' Report at [8.81].

(9) Knowledge of the identity of the purchaser would have been likely to influence relevant investors in deciding whether to acquire or dispose of the Company's securities during the period between the release of the first PSA Announcement and the suspension of the Company from official quotation by the ASX: Mr Bowers' Report at [8.85].

110 Mr Bowers' Report identified the persons who would have commonly been expected to invest in securities of listed corporations. Mr Bowers described how such investors typically determined whether to acquire or dispose of securities. Mr Bowers' Report identified different investor types and included a range of sophistication and investment practices across different groups of investors. Mr Bowers provided a logical and reasoned basis for his opinion that knowledge of the identity of the purchaser, if that information had been generally available, would have been likely to influence relevant investors in deciding whether to acquire or dispose of the Company's shares.

111 The primary judge, at [451] of the Liability Judgment, accepted the expert evidence of Mr Bowers that the Purchaser Identity Information was information that a reasonable person would expect to have a material effect on the price or value of the Company shares and that the statutory test of materiality was indeed satisfied. The primary judge was satisfied that the Purchaser Identity Information was material that would have been likely to influence people who commonly invest in securities in deciding whether to acquire or dispose of the Company shares during the Relevant Period. It was open to the primary judge to accept the expert evidence of Mr Bowers which provided a logical and reasoned basis for his opinion. In those circumstances, we detect no error in the primary judge's reasoning and we see no basis to disagree with her Honour's conclusions. We do not accept Mr Cruickshank's attempt to equate knowing nothing about the identity of the purchaser, with knowing the purchaser's identity but knowing nothing about them. In the former case, for all investors know, the purchaser may be a substantial entity with the ability to complete the transaction. But in the latter case, for the reasons Mr Bowers gave, the combination of the absence of recognition of the purchaser and lack of information about the purchaser would have been likely to have materially increased investors' perception of the completion risk.

Materiality of the Absence of Independent Verification Information

112 Mr Bowers, in his report, expressed the opinion that relevant investors would have expected that the Company would have undertaken independent verification or due diligence in relation

to Wade Energy's capacity to complete the transactions. Mr Bowers, in his Report, provided the following opinions on the Absence of Independent Verification Information:

(1) Knowledge that the Company had not determined the capacity of Wade Energy to meet its purchase obligations is strongly correlated to the quantum of the purchase consideration in question – i.e. a larger purchase price would equate with a more significant failure on the part of the Company to determine the capacity of Wade Energy to complete: Mr Bowers' Report at [9.5].

(2) Knowledge that the Company had not independently verified or otherwise determined the capacity of Wade Energy to complete on its purchase obligations would be significant to relevant investors as this was a substantial purchase obligation in terms of quantum: Mr Bowers' Report at [9.8].

(3) Wade Energy lacked a readily identifiable entity or individual name that would indicate the financial capacity to fund this substantial purchase obligation. In such a scenario, relevant investors would typically expect the Company to have undertaken at least some level of independent verification or due diligence activities on the capacity of such a party to meet its funding commitments: Mr Bowers' Report at [9.10].

(4) Knowledge that the Company had not independently verified or otherwise determined the capacity of Wade Energy to complete either the Northern Star PSA or the Big Star PSA would have been likely to influence relevant investors in deciding whether to acquire or dispose of the Company's shares during the Relevant Period: Mr Bowers' Report at [9.20].

113 Mr Bowers' opinion was to the effect that, in circumstances where the quantum of the transaction was significant and the purchaser was not well known, the Company's failure to independently verify or determine the capacity of Wade Energy to complete either the Northern Star PSA and the Big Star PSA would have been highly relevant to the estimated likelihood of completion.

114 The primary judge at [452] accepted the expert evidence of Mr Bowers that relevant investors would have an expectation that the Company would have undertaken independent verification or due diligence in relation to Wade Energy's capacity to complete the Northern Star PSA and the Big Star PSA. It was open to the primary judge to accept the expert evidence of Mr Bowers

which provided a logical and reasoned basis for his opinion. In those circumstances, we detect no error in the primary judge's reasoning nor do we in any way disagree with the conclusion.

Materiality of Incomplete Financing Approval Information

115 Mr Bowers, in his Report, expressed the opinion that the content of the email that Mr Cruickshank received from Mr Barry Hanson, the Chief Executive Officer of Wade Energy, on 6 September 2015 (**Funding Email**) is highly relevant to the relevant investors' ability to assess the prospects of Wade Energy in completing the Northern Star PSA and the Big Star PSA. Mr Bowers provided the following opinion:

(1) The Funding Email reveals that Wade Energy did not have all of the necessary financing in place for the completion under the Big Star PSA as at 6 September 2015: Mr Bowers' Report at [9.22].

(2) The content of the Funding Email is highly relevant in estimating the likelihood of Wade Energy completing on each of the Northern Star PSA and the Big Star PSA. The Funding Email introduces a different likelihood of completion between the Northern Star PSA and the Big Star PSA. In the absence of the knowledge of the Funding Email there was previously no overt reason for relevant investors to believe that one PSA was more likely to complete than the other: Mr Bowers' Report at [9.23].

(3) The Funding Email provides tangible evidence of the real prospect of Wade Energy being unable to complete the Big Star PSA. The Funding Email confirms that it is highly likely that as at the time of the release of the first PSA Announcement, Wade Energy had not secured full finance to meet the purchase obligations under the Big Star PSA: Mr Bowers' Report at [9.24].

(4) The information contained in the Funding Email introduces an element of conditionality upon completion which is not otherwise conveyed in the first PSA Announcement: Mr Bowers' Report at [9.26].

(5) The Funding Email does not identify who the secondary lender in question is, or how much the secondary finance component accounts for the full purchase price of the Northern Star Assets. This is relevant information for relevant investors undertaking the task of assessing the prospects of the Northern Star PSA completing: Mr Bowers' Report at [9.30] and [9.31].

116 Mr Bowers' Report provides a logical and reasoned basis for his opinion that disclosure of the facts in the Funding Email, if that information had been generally available, would have been likely to influence relevant investors in deciding whether to acquire or dispose of the Company's shares.

117 The primary judge in the Liability Judgment at [453] accepted the expert evidence of Mr Bowers that disclosure of the facts reflected in the Funding Email would have introduced doubt about Wade Energy's ability to complete the Big Star PSA which was not otherwise exposed by the PSA Announcements. It was open to the primary judge to accept the expert evidence of Mr Bowers which provided a logical and reasoned basis for his opinion. In those circumstances, we detect no error in the primary judge's reasoning. Further, we agree with the conclusion. The letter plainly throws doubt on the capacity of the buyer to complete. That the contract was not "subject to finance" did not remove the commercial risk of a buyer's capacity to complete, which any commercial person would have appreciated.

118 It follows for the reasons given, that Grounds 1, 2 and 3 must be rejected.

Ground 4 – Information

119 Mr Cruickshank contended that ASIC failed to identify with precision the "information" which satisfied the conditions in s 674(2)(b) and (c) of the Act of which the Company was aware and should have disclosed.

120 A pleading which involves the contravention of a civil penalty provision such as s 674(2) must be "finally and precisely pleaded": *Australian Securities and Investments Commission v GetSwift Ltd* [2021] FCA 1384 (***GetSwift***) per Lee J at [84] referring to *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1998) 42 IPR 1 per Foster J at [4]. The party making the allegations "must identify the case which it seeks to make and do so clearly and distinctly": *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 per French CJ, Gummow, Hayne and Kiefel JJ at [25].

121 Whilst pleadings must be drafted with precision, "this does not mean that one should lose sight of the fact that the fundamental purpose of pleadings is procedural fairness and ensuring that an opposing party is aware of the case that it was required to meet. Pleadings are a means to an end and not an end in themselves": *GetSwift* at [85].

122 In *GetSwift* at [89], Lee J observed (in the context of continuous disclosure proceedings) that identifying the relevant information, proving it existed, and also proving it was not generally available and material, is fundamental. His Honour further stated that, in cases of any complexity, "there are aspects of the information that are integral and other aspects that might be described as peripheral or supplementary and may not, in and of themselves, be material": *GetSwift* at [89]. A common-sense judgment must therefore be made about how the "information" is identified and described in the pleading.

123 Mr Cruickshank contends that particular information must be understood in a broader context in determining whether it satisfies the test for materiality relying upon the observations made by Martin CJ (with whom Le Miere AJA agreed) and McLure JA in *Jubilee Mines NL v Riley* (2009) 40 WAR 299 at [123], [124], [162] and [187]-[190].

124 In *Australian Securities and Investments Commission v Vocation Ltd (In liq)* [2019] FCA 807; 136 ACSR 339; 371 ALR 155 (***Vocation***), Nicholas J, after referring to the above passages of *Jubilee Mines,* stated at [566]:

> Properly understood, *Jubilee* is authority for the proposition that information that is alleged by a plaintiff to be material, may need to be considered in its broader context for the purpose of determining whether it satisfies the relevant statutory test of materiality. For that reason it will often be necessary to consider whether there is additional information beyond what is alleged not to have been disclosed and what impact it would have on the assessment of the information that the plaintiff alleges should have been disclosed. The judgment of the Court of Appeal *in James Hardie* … is authority for the same general proposition.

125 We reject Mr Cruickshank's challenge to ASIC's "conceptualisation" of the information which it alleged ought to have been disclosed by the Company for the reasons that follow.

126 First, the Concise Statement identifies with precision the Purchaser Identity Information (Concise Statement [14]), the Incomplete Financing Approval Information (Concise Statement [5]) and the Absence of Independent Verification Information (Concise Statement [17(a)]) which information was capable of being understood and providing a foundation for a finding of the contravention of s 674(2) of the Act. Mr Cruickshank failed to identify anything about the way the information was pleaded that made it logically incoherent or incapable of constituting information.

127 Second, Mr Cruickshank did not identify any additional information beyond what is alleged not to have been disclosed that would impact on the assessment of the information which should have been disclosed.

128 Third, Mr Cruickshank made no complaint about the Concise Statement, nor did he complain that the Concise Statement did not provide him with fair notice of the case made against him.

129 For the reasons given, Ground 4 must be rejected.

Ground 5 – Breach of Directors' Duties

130 The primary judge found that Mr Cruickshank contravened s 180(1) of the Act in causing or otherwise permitting the Company to fail to disclose the Purchaser Identity Information, the Incomplete Financing Approval Information and the Absence of Independent Verification Information to the ASX at any time during the Relevant Period. The findings of the primary judge, which provide the evidentiary foundation for the breach of directors' duties by Mr Cruickshank, are as follows.

131 In the Liability Judgment at [520], the primary judge found that Mr Cruickshank could be taken to know that the main assets of the Company were the subject of those agreements from the terms of the PSAs which he signed, and also the financial position of the Company, including the liabilities, by way of the convertible notes. The primary judge found that Mr Cruickshank knew the significance of the completion of the PSAs to the ongoing financial position of the Company. The primary judge was satisfied that Mr Cruickshank as a member of the audit and compliance committee knew or ought to have known about Listing Rule 3.1 and Guidance Note 8. The primary judge found that the Purchaser Identity Information, the Incomplete Financing Approval Information and the Absence of Independent Verification Information were not generally available.

132 In the Liability Judgment at [521], the primary judge found that Mr Cruickshank, based on his experience, would have appreciated that any failure by the Company to comply with its continuous disclosure obligations could expose it to financial harm including by way of liability for a penalty.

133 In the Liability Judgment at [523], the primary judge found that Mr Cruickshank knew the nature of the transactional activity by way of the PSAs was such that it was likely to influence investors. The primary judge found that a person in Mr Cruickshank's position exercising

reasonable care and diligence would have considered the impact of the PSA Announcements and the likely reactions of investors. The primary judge found that investors would have taken into account the significant quantum of the purchase price; the absence of any reference to conditions precedent and that the information disclosed bore the hallmarks of a binding agreement.

134 In the Liability Judgment at [524], the primary judge found that a person in Mr Cruickshank's position exercising reasonable care and diligence would have recognised that investors would have sought to assess the prospect of the sale of the assets completing, and that disclosure of the name of Wade Energy would have equipped them to research that entity and take into account any information in making their assessment.

135 In the Liability Judgment at [525], the primary judge found that a person in Mr Cruickshank's position exercising reasonable care and diligence would have recognised that the Cumulative Information would have been likely to influence investors in deciding whether to hold or sell their shares or whether to acquire new shares.

136 Mr Cruickshank did not directly challenge the above findings of the primary judge. Mr Cruickshank sought to rely upon Grounds 1 to 3 (materiality) and Ground 4 (identification of information) as a basis for contending that there was no obligation on the Company to disclose the Purchaser Identity Information or the Cumulative Information to the ASX and therefore there was no contravention of s 674(2) of the Act and no breach of directors' duties by Mr Cruickshank under s 180(1) of the Act. For the reasons previously given, Grounds 1 to 3 and 4 have been rejected and this basis to challenge the primary judge's finding of contravention of s 180(1) of the Act must also be rejected.

137 The findings made by the primary judge in the Liability Judgment at [515] to [528] were plainly open to be made. The primary judge's reasons provide a logical and reasoned basis for the conclusion that Mr Cruickshank failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in considering whether the Company was required to disclose the Purchaser Identity Information or the Cumulative Information to the ASX.

138 To the extent that Mr Cruickshank contends that ASIC was required to lead evidence from an expert witness, as to the "reasonable standard that would be observed by a director in the position of Mr Cruickshank" that contention must be rejected. As the primary judge observed

in the Liability Judgment at [518], while there are cases in which a breach of s 180(1) has been proved by reference to expert evidence from professional directors or company officers, courts regularly identify breaches of s 180(1) in the absence of such evidence, *Vocation* being one such example. In the present case, there was ample evidence to provide a foundation for the conclusion reached by the primary judge that s 180(1) of the Act had been contravened.

139 Contrary to the implication inherent in Mr Cruickshank's submissions, it was not necessary to find that a person in his position would have known all the matters analysed by the expert, Mr Bowers, and would have arrived at the same conclusions as Mr Bowers did in his evidence. The correct approach under s 180(1) of the Act was to identify the degree of care and diligence that would have been exercised by a reasonable person who was a director of a corporation in the Company's circumstances, occupying the same office and having the same responsibilities as Mr Cruickshank. As described above, that is the approach the primary judge took.

Ground 6 - Disqualification

140 By Ground 6, Mr Cruickshank contends that the primary judge erred in imposing upon him a disqualification order pursuant to s 206C of the Act in respect to the contraventions of s 180(1) and s 674(2) of the Act. Three issues are raised in Mr Cruickshank's submissions. First, the sequence in which the disqualification and civil penalty orders were analysed by the primary judge. Second, the primary judge's reasoning with respect to specific deterrence. Third, the alleged failure of the primary judge to consider the time which lapsed between the impugned events and the disqualification order.

141 Part 2D.6 of the Act is headed 'Disqualification from managing corporations'. Relevantly, s 206C provides as follows:

> **206C Court power of disqualification - contravention of civil penalty provision**
>
> (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
>
> (a) a declaration is made under:
>
> (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or
>
> (ii) section 386-1 (civil penalty provision) of *the Corporations (Aboriginal and Torres Strait Islander) Act* 2006 that the person has contravened a civil penalty provision (within the meaning of that Act); and
>
> (b) the Court is satisfied that the disqualification is justified.

(2) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate.

142 Mr Cruickshank submitted that after declarations of contraventions had been made, the primary judge should have then considered the question of pecuniary penalty before considering whether to impose a disqualification order. This submission must be rejected for the reasons that follow.

143 First, it has been the practice of courts at first instance and on appeal to consider the question of disqualification prior to the court considering the question of a pecuniary penalty. This long-standing practice was referred to by the primary judge in the Liability Judgment at [41] to [44].

[41] The authorities are replete with examples where once a declaration of contravention is made, the Court has turned to consider whether a disqualification order should be made before turning to the question of a pecuniary penalty.

[42] In *Australian Securities and Investments Commission v Forex Capital Trading Pty Limited*, *in the matter of Forex Capital Trading Pty Limited* [2021] FCA 570, Middleton J, having made declarations as to contraventions, including as to contraventions of s 180 of the *Corporations Act*, said:

[112] In respect of Mr Yoshai, I am required to consider the proposed disqualification order under s 206C of the CA before assessing the appropriateness of any pecuniary penalty. Of itself, a disqualification order will protect the public and further the objectives of personal and general deterrence: see *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [48]-[49] (McHugh J) citing *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 (*'ASIC v Adler'*) at 97-99 (Santow J). In *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370; ACSR 460 at [330], Sackville AJA (Beazley and Barrett JJA agreeing) said 'a pecuniary penalty should be imposed on the appellants only if an order for disqualification is an inadequate or inappropriate remedy'.

[43] This recent statement endorses and applies a long-standing practice whereby the question of disqualification is considered prior to a court turning to the question of a pecuniary penalty.

[44] The extract from the Court of Appeal's reasons in *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370 referred to by Middleton J cites the Court of Appeal's decision in *Morley v Australian Securities and Investments Commission (No 2)* [2011] NSWCA 110, where the Court observed:

[131] In *Rich v Australian Securities and Investments Commission* at [178

> McHugh J said that it was 'expected that the courts would consider imposing a pecuniary penalty only if it considered that a civil penalty disqualification provided an inadequate or inappropriate remedy'. In our opinion, pecuniary penalties should be imposed in addition to the disqualification orders.

144 The High Court in *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13 at [42] and [43] restated that the purpose of civil penalty provisions is entirely specific and general deterrence, indeed "they are protective of the public interest and they aim to secure compliance by deterring repeat contraventions". Disqualification orders have in the past been said to have elements of retribution, deterrence, reformation and mitigation as well as the objective of protection of the public: *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 at [52] per McHugh J. The Explanatory Memorandum accompanying the first draft of the *Corporate Law Reform Bill 1992* (Cth) stated at [178]:

> It is expected that in settling appropriate [civil penalty] order, the court would first give consideration to whether it should impose a civil penalty disqualification. The issue should be whether the defendant's conduct, whilst not criminal in nature, was so reprehensible and had such serious consequences as to warrant an order prohibiting the person from managing a corporation. For example, if gross negligence by a director had led directly to massive losses for shareholders, the court may consider that a director should be disqualified for a substantial period, even where there was no question of a dishonest intent. The emphasis should be on preventing a reoccurrence of the contravention by the defendant, and providing a deterrent to other persons involved in the management of corporations. It is expected that the courts would consider imposing a pecuniary penalty only if it considered that a civil penalty disqualification provided an inadequate or inappropriate remedy.

This long-standing practice makes sense in that the primary purpose of disqualification orders is the protection of the public, while the purpose of a pecuniary penalty is to act as a specific and general deterrent to the general public against repetition of like conduct: *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 per Santow J at [60] and [125].

145 Second, there is nothing in the text of the Act that directs that questions of disqualification and penalty must be addressed in any particular order. The primary judge was correct to observe at [74] of the Penalty Judgment that absent good reason there should be no departure from the long-standing practice of considering a disqualification order before a pecuniary penalty. Mr Cruickshank did not advance any good reason to depart from the established practice: *Australian Securities and Investments Commission v Forex Capital Trading Pty Ltd* [2021] FCA 570 per Middleton J at [112] referring to *Gillfillan v Australian Securities and Investments Commission* (2012) 92 ACSR 460; [2012] NSWCA 370 at [330] (Sackville AJA, Beazley and

Barrett JJA agreeing); *Morley v Australian Securities and Investments Commission (No 2)* (2011) 83 ACSR 620; [2011] NSWCA 110 at [131] (Spigelman CJ, Beazley and Giles JJA); *Australian Securities and Investments Commission v Macdonald (No 12)* (2009) 259 ALR 116; [2009] NSWSC 714 at [263]-[265] (Gzell J); *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* (2010) 268 ALR 303; [2010] FCA 292 at [15] (Goldberg J); *Australian Securities and Investments Commission v Soust (No 2)* (2010) 76 ACSR 1; [2010] FCA 388 at [20] (Goldberg J); *Australian Securities and Investments Commission v Healey (No 2)* (2011) 196 FCR 430; [2011] FCA 1003 at [101] (Middleton J); *Re Idylic Solutions Pty Ltd; ASIC v Hobbs* (2013) 93 ACSR 421; [2013] NSWSC 106 at [52]-[53] (Ward JA); *Australian Securities and Investments Commission v Flugge (No 2)* (2017) 342 ALR 478; [2017] VSC 117 at [109] (Robson J).

146 Mr Cruickshank's contention that ASIC did not put to the primary judge that there was a need for specific deterrence must be rejected. ASIC's written submissions filed on 20 November 2020 at [9] observed that the object of civil penalties was general and specific deterrence and at [29] referred to the observations of Beach J in *Australian Securities and Investments Commission v Helou (No 2)* [2020] FCA 1650 (***Helou***) at [147]. ASIC in its reply submissions filed before the penalty hearing on 18 February 2021 (**Reply**) put, at [16], that this was "a case in which the Court ought to give particular consideration to public protection and specific deterrence in relation to Mr Cruickshank" and again made reference to specific deterrence at [21] of its Reply. The primary judge at [80]-[82] expressly referred to *Helou* and the need for both general and specific deterrence in this case.

147 Mr Cruickshank contended that the primary judge erred in making the disqualification order by failing to have taken into consideration, in the assessment of the appropriate disqualification period, that period of time which had already elapsed between the impugned events and the date when the disqualification order was made on 16 December 2021.

148 This contention must be rejected as there was nothing prior to the 16 November 2021 disqualification order which prevented Mr Cruickshank from continuing to serve as a director. Mr Cruickshank did not give evidence at the penalty hearing of the effect that a disqualification order would have upon him. No submission was made by Mr Cruickshank regarding the length of time that had lapsed between the impugned events and the Liability Judgment or the penalty hearing. The primary judge's reasons for the disqualification order, and the period of that

order, being four years demonstrate no *House v The King* error in the primary judge's reasoning.

DISPOSITION

149 For the reasons given, the appeal will be dismissed with costs.

I certify that the preceding one hundred and forty-nine (149) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop and Justices Jackson and Anderson.

Associate: 

Dated: 5 August 2022