

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 10/05/2022 7:26:52 AM AWST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Concise Statement  
File Number: WAD84/2022  
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v  
AUSTRALIAN MINES LIMITED ACN 073 914 191 & ANOR  
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 10/05/2022 11:14:36 AM AWST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

## Concise Statement



**Federal Court of Australia**  
**District Registry: Western Australia**  
**DIVISION: GENERAL**

**No. WAD**                      **of 2022**

**Australian Securities and Investments Commission**

Plaintiff

**Australian Mines Limited ACN 073 914 191**

First Defendant

**Benjamin John Bell**

Second Defendant

### A. INTRODUCTION

1. The First Defendant (**AUZ**) is an Australian company whose shares are listed on the Australian Securities Exchange (**ASX**). At all relevant times, AUZ owned the **Sconi Project**, a cobalt, nickel and scandium resource in North Queensland. The Second Defendant (**Mr Bell**) was at all material times the managing director of AUZ.
2. On 9 February 2018, AUZ and its wholly owned subsidiary, **Sconi Mining Operations Pty Ltd** (the operator of the Sconi Project), entered into a Term Sheet for an **Offtake Agreement** with SK Innovation Co Ltd (**SKI**), a South Korean company that manufactures and supplies electric batteries for use in motor vehicles.
3. These proceedings concern the conduct of AUZ and Mr Bell in relation to presentations given by Mr Bell at overseas investor conferences (**121 Conferences**) where he made unfounded representations regarding AUZ's ability to fund the Sconi Project and overstating the value of the Offtake Agreement for its major asset.
4. The unfounded representations were that:
  - 4.1. **SKI** was funding the construction of a critical (\$500 million plus) plant, when in fact, no one had offered or agreed such funding;
  - 4.2. the Offtake Agreement was valued at \$5 billion, when the terms of that agreement included a buyer's discount of 15%, and the representation was an 'in situ' valuation in contravention of Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (**JORC Code**).
5. The Plaintiff (**ASIC**) alleges that:
  - 5.1. AUZ contravened s674(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**) by failing to inform the ASX of material information concerning the value and funding of the Sconi Project and the Offtake Agreement; and

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Filed on behalf of Australian Securities and Investments Commission, the Plaintiff

Prepared by: Jennifer Flinn

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- 5.2. Mr Bell breached his duty of care and diligence in s180(1) of the Corporations Act by making various false or misleading representations with respect to the Sconi Project and the Offtake Agreement.

## **B. IMPORTANT FACTS GIVING RISE TO THE CLAIM**

### ***The Offtake Agreement***

6. The Offtake Agreement included terms that, or to the effect that:
  - 6.1. SKI would buy all 'Product' produced by the Sconi Project provided SKI was satisfied with the result of a sample validation of the 'Product' it would conduct;
  - 6.2. SKI would assist in the development, construction and/or financing of a processing plant (**Plant**) for the Sconi Project by recommending and supporting the activities of a financial adviser who would work on equity or debt raising, including project financing, from prospective financiers globally (**Financing Mandate**), a clause that was expressed to be non-binding; and
  - 6.3. SKI was entitled to a buyer's discount of 15% on the base price paid for cobalt and nickel (**Buyer's Discount**), conditional upon SKI exercising an option to acquire 19.9% of AUZ's shares, at 0.12 AUD per share (**Share Option**).
7. The Offtake Agreement was subject to satisfaction of a number of conditions precedent, including the execution of final binding documentation; Sconi Mining Operations obtaining financing for the development and construction of the Sconi Project, including the Plant (**Finance Condition**); and the commencement of mining at the Sconi Project by a specified date (together, the **Conditions Precedent**).

### ***Announcements to the ASX about the Offtake Agreement and the Sconi Project***

8. On 19 February 2018, AUZ issued an announcement to the ASX about the Offtake Agreement (**19 February Announcement**). The 19 February Announcement described the Offtake Agreement, including the Share Option and the Finance Condition, but did not disclose the terms of the Financing Mandate or the terms or quantum of the Buyer's Discount.
9. On 21 February 2018, AUZ issued to the ASX the slides from a presentation at the RIU Explorer's conference (**RIU Slides**). The RIU Slides referred to the Offtake Agreement and stated "*Off-take contact [sic] signed on \$5 billion of Cobalt and Nickel product*" and "*Market value of product in initial term is \$5 billion if fully executed at current LME-linked pricing*" (**\$5 billion Statements**). Following inquiries by the ASX, AUZ retracted the slides on 28 February 2018 (**RIU Retraction**) and on 6 March 2018, issued a revised presentation that did not refer to the \$5 billion Statements. The RIU Retraction stated that the \$5 billion Statements were "*extrapolated forecast financial information*", the inclusion of which was not consistent with the JORC Code.
10. Also on 6 March 2018, AUZ issued an announcement to the ASX about the Offtake Agreement (**6 March Announcement**). The 6 March Announcement confirmed that AUZ had signed the Offtake Agreement, stated that SKI would be entitled to a "*modest commercial-in-confidence buyer discount on the base price*" of the Offtake Agreement provided it exercised the Share Option and referred to the Finance Condition, but did not otherwise disclose the terms of the Buyer's Discount or Financing Mandate.

## **The 121 Conferences**

11. The 121 Conferences are a series of conferences that connect mining companies with potential investors, brokers, commodity traders, offtake partners, analysts and service providers. The presentations given by mining companies are recorded with the intention of being published on the 121 Conference YouTube channel by the conference organisers.
12. On 23 April 2018, Mr Bell gave a presentation at a 121 Conference held in Hong Kong (**Hong Kong 121 Presentation**).
13. On 17 May 2018, Mr Bell gave a presentation at a 121 Conference held in London (**London 121 Presentation**). The London 121 Presentation was published on YouTube on 15 June 2018 (**London 121 YouTube Video**), where it remained until about 9 July 2018 when it was taken down at the request of AUZ. A link to the London 121 YouTube Video was posted on the website <https://hotcopper.com.au> (**HotCopper**) on 15 June 2018.
14. During the Hong Kong 121 Presentation and the London 121 Presentation, Mr Bell stated that:
  - 14.1. AUZ had secured finance for the construction of the Plant, and SKI had committed to funding construction of the Plant (**Funding Commitment Representations**); and
  - 14.2. the value to AUZ of the Offtake Agreement, based upon the tonnes per annum of nickel sulphate and cobalt sulphate to be supplied under the Offtake Agreement, was \$5 billion (**Value Representation**).
15. Further, during the London 121 Presentation, Mr Bell stated that it was a condition of the Offtake Agreement that SKI commit to funding construction of the Plant (**Offtake Condition Representation**).

(The Funding Commitment Representations, the Value Representation and the Offtake Condition Representation are together the **Representations**).
16. The Funding Commitment Representations and Offtake Condition Representation were false because, as at the date of the representations:
  - 16.1. AUZ had not secured finance for the construction of the Plant, and SKI had not committed to funding construction of the Plant; and
  - 16.2. in respect of the statements made during the London 121 Presentation, it was not a condition of the Offtake Agreement that SKI commit to funding construction of the Plant, and SKI did not have any other obligation to fund construction of the Plant,

(paragraphs 16.1 and 16.2 being the **SKI Funding Information**).
17. The Value Representation was materially misleading because:
  - 17.1. at the date of that representation, the value of the Offtake Agreement to AUZ was reduced by:
    - 17.1.1. the quantum of the Buyer's Discount; and
    - 17.1.2. a marketing fee payable to SKI of an amount to be agreed,

(being the **Discounted Offtake Value Information**); and/or

- 17.2. it constituted an 'in situ' valuation of the Sconi Project, contrary to the prohibition in cl. 51 of the JORC Code, and implied that AUZ had undertaken a Pre-Feasibility Study or Feasibility Study for the scope of extraction required by the Offtake Agreement, which had assessed the economically mineable part of the resource, and all modifying factors, consistent with the requirements of cl. 28 of the JORC Code, when it had not.
18. On 27 June 2018, AUZ retracted the Value Representation in an ASX announcement and retracted the SKI Funding Information in response to an ASX Query Letter. The share price fell from its closing price on 19 June 2018 of 10 cents to an intra-day low of 8.1 cents and a closing price on 28 June 2018 of 9 cents.

### **C. SUMMARY OF RELIEF SOUGHT FROM THE COURT**

19. ASIC seeks declarations, pecuniary penalties and costs against AUZ and Mr Bell as set out in its Originating Application accompanying this Concise Statement. It also seeks a disqualification order against Mr Bell.

### **D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT**

#### ***Continuous disclosure contravention***

20. The SKI Funding Information, the existence and quantum of the Buyer's Discount (**Buyer's Discount Information**), and/or the Discounted Offtake Value Information (together, separately or in any combination the **Material Information**) was information that:
- 20.1. AUZ had, within the meaning of s674(2) of the Corporations Act, by:
- 20.1.1. in the case of the Buyer's Discount Information, no later than 19 February 2018; and/or
- 20.1.2. in the case of the balance of the Material Information, no later than 23 April 2018, 17 May 2018 and/or 15 June 2018 (the date of the HotCopper posting);
- 20.2. was not generally available; and
- 20.3. a reasonable person would expect, if it were generally available, to have a material effect on the price or value of AUZ Shares.
21. In the premises, AUZ contravened s674(2) of the Corporations Act by failing to tell the ASX:
- 21.1. the Buyer's Discount Information; and
- 21.2. the balance of the Material Information before 27 June 2018.

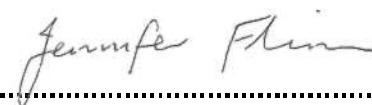
#### ***Contravention of s 180 by Mr Bell***

22. Mr Bell engaged in the following contraventions of s 180(1) of the Corporations Act by failing to discharge his duties to AUZ with the degree of care and diligence that a reasonable person would exercise, if he or she was the managing director of a corporation in AUZ's circumstances and occupied the office held by Mr Bell and had the same responsibilities within the corporation.

23. By giving the Hong Kong 121 Presentation and London 121 Presentation, Mr Bell contravened s180(1) by:
- 23.1. making the Representations, while he was aware, or ought reasonably to have been aware, that the Representations were false in a material particular or were materially misleading;
  - 23.2. having made the Representations, failing to cause AUZ to correct those Representations, or to tell the ASX the Material Information;
  - 23.3. making the Value Representation inconsistently with the JORC Code in circumstances where he was aware, or ought reasonably to have been aware, that the making of the similar \$5 billion Statements at an earlier time had resulted in the ASX making inquiries of AUZ as to its compliance with the JORC Code and led to the issuing of the RIU Retraction;
  - 23.4. not taking reasonable steps to determine or ensure that the Value Representation made at the Hong Kong and London 121 Presentations complied with the JORC Code; and/or
  - 23.5. having made the Value Representation, by failing to disclose to the ASX:
    - 23.5.1. the modifying factors and other matters required by the JORC Code sufficient to support the valuation;
    - 23.5.2. the Discounted Offtake Valuation Information;
    - 23.5.3. the SKI Funding Information; and/or
  - 23.6. causing AUZ to breach s674(2) of the Act and thereby exposing AUZ to the risk of proceedings for contraventions of the Corporations Act, legal costs and penalties.

#### **E. ALLEGED HARM**

24. The making of the Representations and the failure to disclose the Material Information had the effect that the market was misinformed about the true state of funding of the Sconi Project and the value of the Offtake Agreement. These matters constituted information that may have influenced investors to buy or sell AUZ Shares.



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**Jennifer Flinn**  
AGS Lawyer  
for and on behalf of the Australian Government Solicitor  
Lawyer for the Plaintiff

This Concise Statement was prepared by Yaseen Shariff SC, Tim Chalke and Talia Epstein.

### **Certificate of lawyer**

I, Jennifer Flinn certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the concise statement.

Date: 10 May 2022



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**Jennifer Flinn**  
AGS Lawyer  
for and on behalf of the Australian Government Solicitor  
Lawyer for the Plaintiff