FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Austal Ltd [2022] FCA 1231

File number:	VID 307 of 2021
Judgment of:	**O'BRYAN J**
Date of judgment:	10 October 2022
Date of publication of reasons:	14 October 2022
Catchwords:	**CORPORATIONS** – admitted contraventions of ss 674(2) and (2A) of the *Corporations Act 2001* (Cth) – declarations and pecuniary penalties sought by plaintiff not opposed by defendants – whether form of declarations appropriate – whether quantum of penalties appropriate
Legislation:	*Corporations Act 2001* (Cth) ss 674(2)-(2A), 676, 677, 1317E, 1317G(1A) *Federal Court of Australia Act 1976* (Cth) s 21 ASX Listing Rules rr 3.1, 19.12
Cases cited:	*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 *Australian Building and Construction Commissioner v Pattinson* (2022) 175 ALD 383 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 *Australian Competition and Consumer Commission v Cornerstone Investment Australia Pty Ltd (in liq) (No 5)* [2019] FCA 1544 *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640

	Australian Securities and Investments Commission v Adler (No 5) [2002] NSWSC 483; 42 ACSR 80 *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55 *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; 234 ALR 511 *Australian Securities and Investments Commission v Vocation Ltd (In Liq)* [2019] FCA 807; 371 ALR 155 *Australian Securities and Investments Commission v Warrenmang Ltd* [2007] FCA 973; 63 ACSR 623 *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 *Markarian v The Queen* (2005) 228 CLR 357 *Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170 *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 *Singtel Optus v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 *Trade Practices Commission v CSR Ltd* [1990] FCA 762; ATPR 41-076 *TPT Patrol Pty Ltd Ltd (as trustee for the Amies Superannuation Fund) v Myer Holdings Ltd* [2019] FCA 1747; 140 ACSR 38
Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
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Number of paragraphs:	100
Date of hearing:	10 October 2022
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Counsel for the First Defendant:	Mr K Dharmananda SC

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Solicitor for the Second Defendant:	HFW Australia

ORDERS

VID 307 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**AUSTAL LTD** First Defendant
	DAVID SINGLETON Second Defendant

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

DATE OF ORDER: **10 OCTOBER 2022**

THE COURT NOTES THAT:

In this order, **Information** means:

(a) it was likely that there was a significant increase in the estimated actual cost of construction for the Littoral Combat Shipbuilding program and a reset and profit writeback of at least US$90million was required in FY2016;

(b) the reset and profit writeback would generate a loss of at least US$40million in FY2016 for Austal USA LLC (a wholly-owned subsidiary of Austal Holdings Inc which was at all material times a wholly-owned subsidiary of the first defendant, and whose operations were the largest contributor to the first defendant's revenue and earnings);

(c) the reset and profit writeback would generate a significant loss in FY2016 for the first defendant; and

(d) the EBIT margin guidance announced to the ASX by the first defendant on 10 December 2015 was no longer reliable and should be withdrawn.

THE COURT DECLARES THAT:

1. The first defendant contravened s 674(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**) on one occasion from 16 June 2016 and continuing to 4 July 2016 by failing to notify the ASX of the Information, in circumstances where:

   (a) on 16 June 2016, the first defendant became aware of the Information;

(b) the Information was not generally available within the meaning of s 676 of the Corporations Act and for the purposes of s 674(2)(c)(i) of the Corporations Act;

(c) the Information was information that a reasonable person would have expected, if it had been generally available, to have had a material adverse effect on the price or value of the first defendant's securities, within the meaning of s 677 of the Corporations Act and for the purpose of s 674(2)(c)(ii) of the Corporations Act;

(d) in the period between 16 June 2016 and 4 July 2016, the first defendant was obliged by Rule 3.1 of the listing rules of the ASX and s 674(2) of the Corporations Act to immediately notify the ASX of the Information.

2. The second defendant, in his position of Chief Executive Officer of the first defendant, contravened s 674(2A) of the Corporations Act on one occasion from 16 June 2016 continuing to 4 July 2016 by reason of being knowingly concerned in the contravention by the first defendant of s 674(2) of the Corporations Act (as set out in paragraph 1 above).

THE COURT ORDERS THAT:

3. Pursuant to s 1317G(1A) of the Corporations Act in respect of the contraventions the subject of the above declarations:

(a) the first defendant pay a pecuniary penalty to the Commonwealth of Australia in the sum of $650,000; and

(b) the second defendant pay a pecuniary penalty to the Commonwealth of Australia in the sum of $50,000.

4. The defendants pay a contribution to the plaintiff's costs in a lump sum of $500,000.

5. The proceedings otherwise be dismissed on the basis that, other than provided for in order 4 above, there be no order as to costs between the plaintiff and the defendants.

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

REASONS FOR JUDGMENT

O'BRYAN J:

Introduction

1 By an originating process and concise statement filed on 10 June 2021, the Australian Securities and Investments Commission (**ASIC**) sought declaratory relief and pecuniary penalties against the first defendant, Austal Ltd (**Austal**), and the second defendant, David Singleton (who was Chief Executive Officer (**CEO**) of Austal during the relevant period), in respect of contraventions of the following statutory provisions:

(a) in respect of Austal, s 674(2) of the *Corporations Act 2001* (Cth) (**Act**); and

(b) in respect of Mr Singleton, s 674(2A) of the Act.

2 The matter was initially listed for a trial of 10 days commencing on 3 October 2022. On 9 September 2022, the parties notified the Court that they had reached agreement on declaratory relief and pecuniary penalties that would be sought jointly in the proceeding. On 14 September, the parties provided a jointly proposed form of order. On that basis, the trial was vacated and the proceeding was instead listed for a hearing on relief on 10 October 2022.

3 On 27 September 2022, the parties filed a Statement of Agreed Facts (**SOAF**). That document was marked "Exhibit A" during the penalty hearing. On 5 October 2022, the parties filed joint written submissions on penalty and relief. The following reasons draw in large part upon those joint written submissions.

4 On the basis set out in the SOAF, Austal admits that between 16 June 2016 and 4 July 2016 (the **Contravention Period**), it failed to notify the Australian Securities Exchange (**ASX**) that a one-off writeback of work in progress of at least US$90 million was required for the financial year ending 30 June 2016 (**FY2016**) and that the writeback would generate a loss of at least US$40 million for Austal's subsidiary, Austal USA LLC (**AUSA**) and a significant loss for Austal in FY2016, contravening s 674(2) of the Act. Mr Singleton admits that he was involved in Austal's contravention of s 674(2) of the Act for the purpose of s 674(2A).

5 The parties jointly submit that, pursuant to s 1317E of the Act and s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**), the Court should make a declaration of contravention by Austal of s 674(2) of the Act and a declaration of contravention by Mr Singleton of s 674(2A) of the Act.

6 The parties have also reached a joint position with respect to the pecuniary penalties sought by ASIC. They submit that the Court ought to fix a pecuniary penalty of $650,000 for Austal and $50,000 for Mr Singleton.

7 At the hearing, the defendants acknowledged that the facts and matters admitted in the SOAF and the joint written submissions are admissions made for the purposes of this proceeding and override any corresponding denial or non-admission contained in their respective concise responses filed in the proceeding.

8 On the date of the hearing, I made the declarations proposed by the parties and also imposed penalties in the amounts proposed. These are my reasons for those orders.

Statutory prohibitions

9 During the relevant period, s 674 of the Act provided (relevantly):

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

10 Section 676 of the Act defines when information is generally available. During the relevant period, it provided (relevantly):

> (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).

11 During the relevant period, s 677 provided that:

> … 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.

12 There is no contravention of s 674 unless the relevant Listing Rules required disclosure of the information. The relevant listing rules are the ASX Listing Rules. During the relevant period, Listing Rule 3.1 provided that:

> 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.

13 The term "aware" was defined in Listing Rule 19.12 as follows:

> an entity becomes aware of information if, and as soon as an officer of the 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.

14 During the relevant period, the continuous disclosure obligation in Listing Rule 3.1 was subject to the exceptions set out in Listing Rule 3.1A, which states that Listing Rule 3.1 does not apply to particular information while:

> 3.1A.1 One or more of the five situations set out in Listing Rule 3.1A.1 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 the 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.

15 The elements that are required to establish a contravention of s 674(2) were succinctly summarised by Nicholas J in *Australian Securities and Investments Commission v Vocation Ltd (In Liq)* [2019] FCA 807; 371 ALR 155 at [512], as follows:

> To establish a contravention of s 674(2) in the present case, it is necessary for ASIC to demonstrate that:
>
> - there existed 'information' within the meaning of Listing Rule 3.1 and s 674(2)(b);
> - the entity had that information (s 674(2)(b)) and was aware of it (Listing Rule 3.1);
> - the information was not generally available (s 674(2)(c)(i), Listing Rule 3.1A.1); and
> - a reasonable person would have expected that information to have had a material effect on the price or value of the entity's shares, if it had been generally available (s 674(2)(c)(ii), Listing Rule 3.1).

16 Relevantly for the purpose of subs (2A) of s 674, s 79 of the Act provided (and provides) that:

> A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to the contravention; or
>
> (d) conspired with others to effect the contravention.

Relevant facts

17 The following is a summary of the relevant facts stated in the SOAF.

18 Austal's securities were listed on the ASX at all relevant times, making it a listed disclosing entity within the meaning of s 111AL(1) of the Act that was subject to and bound by the ASX Listing Rules.

19 From 4 April 2016, Mr Singleton was the CEO of Austal and a member of Austal's Continuous Disclosure Committee. Prior to that time, he had been a non-executive director of Austal from

December 2011 until 3 April 2016 and, from January 2016 until 3 April 2016, the CEO designate of Austal.

20 Austal, through its subsidiaries, carried on the business of designing and building defence and commercial ships for governments, navies and ferry operators worldwide.

21 AUSA was at all material times a wholly owned subsidiary of Austal Holdings Inc, which itself was a wholly-owned subsidiary of Austal. During the Relevant Period, AUSA's business operations comprised:

(a) Ship building operations – consisting of the Expeditionary Fast Transport program and the Littoral Combat Ship (**LCS**) program;

(b) Systems – combat systems and integration of combat systems with vessels; and

(c) Sustainment operations – maintenance of completed vessels.

22 During the Relevant Period, Austal, AUSA and the US Department of Defense were party to a Special Security Agreement (**SSA**) with the Unites States to protect US national security interests against foreign influence. Under the SSA, certain restrictions were imposed on the ability of Austal to control or influence the operations of AUSA, the access of Austal personnel to AUSA and the information that could be and was reported from AUSA to Austal, though the SSA did not ultimately preclude Austal's CFO from working with the AUSA finance team in undertaking the review described below once approvals had been obtained to facilitate this.

23 AUSA was the largest contributor to Austal's revenue and earnings in both the financial years ending 30 June 2015 (**FY2015**) and FY2016. During FY2015, AUSA derived approximately 82% of its total annual revenue from its shipbuilding operations. The substantial majority of AUSA's revenue since the financial year ended 30 June 2014 was obtained from the LCS program.

24 The first ship built by Austal as prime contractor as part of the LCS program was LCS 6. It was delivered to the US Navy in August 2015, although AUSA's obligations to the US Navy were not complete at the date of delivery. In FY2016, AUSA was constructing seven additional vessels as part of the program (LCS 8, 10, 12, 14, 16, 18 and 20).

25 Financial forecasts for the Austal group were prepared by Austal's Financial Planning and Analysis (**FPA**) team, under the supervision of Austal's Chief Financial Officer (**CFO**), Greg Jason. The group forecasts incorporated forecasts for AUSA, which were prepared by AUSA

and analysed by the FPA team each month. The extent to which the FPA team was able to analyse the forecasts prepared by AUSA was affected by the SSA.

26 Austal used an estimate to completion (**EAC**) approach to forecasting the total construction costs of, and recognising the revenue derived from, AUSA's ship building operations, using forecasts prepared by AUSA. Austal and AUSA used a "percentage complete" method to recognise revenue on AUSA's ship building operations for the purposes of preparing Austal's statutory accounts. In general terms, this meant that Austal recognised revenue and profits earned to date on vessels under construction in the same proportion as costs incurred to date relative to the EACs. Where EAC forecasts increased significantly, adjustments had to be made to Austal's accounts to reflect the changes. The relevant accounting standards (AASB 111 Construction Contracts and AASB 108 Accounting Policies, Changes in Accounting Estimates and Errors) required EAC increases to be recognised in the current reporting period so that profit recognition reflected current EACs. When there was a change in estimate, the relevant adjustment was a writeback on previously recognised profit in the period of the change.

27 In an announcement to the ASX on 10 December 2015, Austal announced that:

(a) Austal's ability to apply lessons learnt and productivity enhancements from LCS 6 to vessels in advanced construction, namely LCS 8 and LCS 10, had been more limited than anticipated. As a result, FY2016 earnings from Austal's US shipyard were expected to be lower than in FY2015, with US shipbuilding EBIT margin expected to be in the range of 4.5% to 6.5% (**EBIT Margin Guidance**); and

(b) Austal CEO, Andrew Bellamy, said:

(i) while there were flow on effects from LCS 6 onto LCS 8 and 10, vessels at earlier stages of construction would benefit from the lessons learnt on LCS 6 to increase future US shipbuilding margin (**Margin Growth Representation**);

(ii) the LCS program was maturing more slowly than Austal had expected, and Austal was working hard to manage the risks and expected an improvement across the program after delivery of LCS 10; and

(iii) the ongoing strong performance of the US$1.6 billion Expeditionary Fast Transport at Austal's shipyard was a great illustration of the efficiencies Austal could deliver once a vessel program reached the mature production stage, and that Austal was confident that the LCS program would be no different.

28 The US shipbuilding EBIT margin can be used as an approximate proxy for operating profit as a percentage of revenue from AUSA's shipbuilding operations.

29 In early 2016, Mr Jason identified in a paper provided to Austal's board and Audit and Risk Management Committee that the analysis of the AUSA forecasts typically generates many questions and that "[s]ignificant EAC changes could occur in FY2016 H2 which would perpetuate the pattern of continually resetting downwards". Mr Jason proposed to spend two weeks at AUSA during March 2016 "to analyse and quantify an error band around the USA forecast scenario".

30 In an announcement to the ASX released on 23 February 2016, Austal announced that its USA EBIT margin was in the middle of the range described in the EBIT Margin Guidance, while noting that:

(a) earnings had been reduced compared to the prior comparative period because of reduced shipbuilding margins in the USA and lower throughput and margin in Australia;

(b) earnings were impacted by reduced shipbuilding margins in the USA due to cost and schedule performance on LCS 6 continuing to impact on LCS 8 and 10 due to a concurrent build program, as previously announced on 10 December 2015;

(c) the speed at which the LCS program had matured since delivery of LCS 6 had been slower than initially expected, as announced on 10 December 2015, leading to lower earnings for the US shipyard in the half year; and

(d) it recognised there was significant work to be done to drive improvements across the program for subsequent vessels.

31 On 12 March 2016, the CFO of AUSA resigned.

32 In April 2016, Mr Jason flew to the United States for approximately two weeks to undertake a scoping exercise for the proposed review of the LCS EAC costs. Following this scoping exercise, Mr Jason prepared another paper, which was presented to Austal's board at its 28 April 2016 meeting and which outlined a plan of analysis to be completed for the LCS program to assess what was "the reasonable range of uncertainty for project cost EACs".

33 On 3 May 2016, Mr Jason returned to the United States to commence the proposed LCS EAC costs review (**LCS EAC Review**). In order to enable Mr Jason to undertake the review, Mr Singleton requested that the AUSA Board procure and provide Mr Jason with clearances under

the SSA. Whilst in the United States, Mr Jason was in contact with Mr Singleton on average once or twice per week either by telephone, text message, email or Webex video conference.

34 On 6 May 2016, Mr Singleton gave a presentation to a Macquarie investor conference. The presentation slide pack was released to the ASX. It relevantly stated that "LCS first of class issues continuing with margin under review".

35 In early May 2016, Mr Singleton had a meeting with JP Morgan in which they discussed (among other things) market communications which would be appropriate if Austal was required to announce a material earnings downgrade relating to AUSA. The paper prepared by JP Morgan at the request of Mr Singleton (the first of three such papers) following that meeting included information that Austal was conducting a detailed internal review of costs associated with the LCS program and that it was contemplating a material earnings downgrade to its AUSA business. Mr Singleton and Mr Jason engaged with JP Morgan on at least four further occasions between early May 2016 and 30 June 2016.

36 By 11 May 2016, Mr Jason had learned that committed costs on LCS vessels from LCS 6 to LCS 16 were already higher than the total EACs for those vessels, and he had started conducting a validation exercise to check for credits and errors. He communicated this information to Mr Singleton.

37 On 3 June 2016, Mr Jason sent to Mr Singleton by email an early draft of a Powerpoint document, titled "FPA USA FY2016 (10+2) Forecast" (version 1.03), which recorded the current status of the LCS EAC Review (**the LCS EAC Review Presentation**). The Presentation went through a number of iterations before it was presented (in a revised form) to the Austal board on 28 June 2016. Mr Singleton, Mr Jason and Craig Perciavalle, the President of AUSA, had a Webex meeting on 3 or 4 June 2016 to discuss the Presentation. Mr Jason emailed further versions of the Presentation to Mr Singleton on 4 June 2016, 10 June 2016, 18 June, 22 June and 27 June 2016.

38 By 16 June 2016, Mr Jason had reached a concluded view that a profit writeback was necessary. The then-current draft version of the LCS EAC Review Presentation, which Mr Jason had sent to Mr Singleton on 10 June 2016 (version 1.10), indicated that the likely amount of the writeback (on the "Bull" case, that is, the revised EAC forecast that was most favourable to Austal) was at least US$90 million. Mr Jason advised Mr Singleton of his concluded view by telephone or WebEx meeting the same day.

39 As a result of these matters, as at 16 June 2016, Austal and Mr Singleton were aware that:

(a) it was likely that a significant increase in LCS EACs and a profit writeback of at least US$90 million was required by FY2016;

(b) the reset and profit writeback would generate a loss of at least US$40 million in FY2016 for AUSA;

(c) the reset and profit writeback would generate a significant loss in FY2016 for Austal; and

(d) the EBIT Margin Guidance was no longer reliable and should be withdrawn,

(together, the **Information**).

40 The Information was not discoverable by inquiries by any third parties. Despite Austal's and Mr Singleton's awareness of the Information, Austal did not immediately inform the ASX.

41 In the period between 16 June 2016 and 30 June 2016, Austal and Mr Singleton sought to understand the following matters:

(a) the impact of the Information on Austal's cash position;

(b) the reaction of Austal's banking syndicate to the Information and whether Austal would be required to reduce its debt under its banking facilities;

(c) the extent to which the US Navy might be liable to otherwise agree to pay for any of the modifications that Austal was aware at the time would be required on the LCS; and

(d) the likelihood that LCS 6's performance in the second shock trial might necessitate further design modifications that could cause further EAC increases and exacerbate the extent of the profit writeback.

42 Between 16 June 2016 and 21 June 2016, Mr Jason, to the knowledge of Mr Singleton, met with members of Austal's banking syndicate regarding the LCS EAC Review and informed them of the need for a profit writeback.

43 On 17 June 2016 and 24 June 2016, Austal made announcements to the ASX in relation to, respectively, LCS 6 completing its first shock trial, and LCS8 being delivered to the US Navy, but Austal did not disclose the Information.

44 On 22 June 2016, Mr Perciavalle presented a version of the LCS EAC Review Presentation to a meeting of the AUSA board, which Mr Singleton and Mr Jason attended.

45 On 28 June 2016, Mr Jason presented the then-current version of the LCS EAC Review Presentation to the Austal board. The EAC Review Presentation was not circulated to the board in the board papers or separately prior to the board meeting. No decision in relation to the LCS EAC or the profit writeback was recorded in the minutes of meeting.

46 On 29 June 2016, Austal made a decision to call a trading halt and on 30 June 2016, the securities of Austal were placed in trading halt session pursuant to Listing Rule 17.1 at the request of Austal.

47 On 1 July 2016, there was a further meeting of the Austal board, which was attended by Mr Jason. There are no minutes or other contemporaneous written record of what was discussed or decided at the meeting.

48 On 4 July 2016, Austal released an announcement to the ASX entitled "LCS Program and Earnings Update", together with a presentation from Mr Singleton and Mr Jason entitled "FY2016 earnings and LCS program update". The announcement relevantly stated:

> - A comprehensive review of Austal's ~ US$4 billion LCS block buy contract has been completed following delivery of LCS 6 & 8 and preliminary results of the first two physical shock trials of LCS 6.
> - The contractual requirement to meet the military shock standard and US Naval Vessel Rules has driven a significantly higher level of modifications to the ship design and cost than previously estimated.
> - Initial findings of the shock trials are that the implementation of the design modifications have been successful, providing greater certainty about the maturity of the revised baseline design and the cost of construction.
> - Design modifications and significant re-work of construction already undertaken are being implemented across the 9 LCS vessels currently under construction (LCS 10 - 26).
> - A US$115 million (A$156 million) one off write back of work in progress (WIP) is required to recognise an increase in the cost of construction (unaudited).
> - Statutory Group EBIT is expected to be in the range $(116) - (121) million.
>
> …

49 In the period from 16 June 2016 to the imposition of the trading halt on 30 June 2016, 19,178,880 Austal shares with a total value of $23,342,284.61 were traded.

50 After the disclosure was made on 4 July 2016, Austal's share price dropped from a closing price on 29 June 2016 (prior to the trading halt) of $1.21 to an intra-day low of $0.935, closing at $1.11. The trading volume was up on 4 July 2016 by approximately 5.7 million compared to

the previous trading day (an increase from approximately 1.4 million shares sold on 29 June 2016 to approximately 7.1 million shares sold on 4 July 2016).

Admitted contraventions

51 The defendants admit that each of the elements of s 674(2) is satisfied. Specifically, the defendants admit that:

(a) Austal, by reason of the knowledge of its officers, Mr Singleton and Mr Jason, was aware of the Information for the purposes of Listing Rule 3.1 and hence had the Information for the purposes of s 674(2)(b);

(b) the Information was not generally available, and that it was material, in the sense that a reasonable person would have expected that information to have had a material effect on the price or value of Austal's shares if it had been generally available for the purposes of Listing Rule 3.1 and ss 674(2)(c)(ii) and 677 of the Act; and

(c) as a result, between 16 June 2016 and 4 July 2016, Austal was obliged by s 674(2) of the Act and Listing Rule 3.1 to notify the ASX of the Information, and it did not.

52 The defendants place no reliance on the exception referred to in Listing Rule 3.1A. The defendants admit that, even if one or more of the five situations in Listing Rule 3.1A.1 applied (which they do not submit was the case), in circumstances where Austal had given the EBIT Margin Guidance and made the Margin Growth Representation, a reasonable person would have expected Austal to immediately disclose the Information in order to correct or prevent a false market in its securities: see *TPT Patrol Pty Ltd Ltd (as trustee for the Amies Superannuation Fund) v Myer Holdings Ltd* [2019] FCA 1747; 140 ACSR 38 (***TPT Patrol***) at [1301]-[1314].

53 The fact that, between 16 June 2016 and 30 June 2016, Austal and Mr Singleton sought to understand matters including (as described above) the impact of the Information on Austal's cash position, its debt under its banking facilities, the extent to which the US Navy might be liable or otherwise agree to pay for any of the modifications and the likelihood that LCS 6's performance in the second shock trial might necessitate further modifications, did not provide lawful justification for refraining from immediately notifying the ASX of the Information.

54 While it is no part of ASIC's case that Austal intentionally, wilfully, fraudulently or dishonestly contravened, or was reckless in complying with, any legal obligation under statute or under the general law, the defendants admit that:

(a) the breach of s 674(2) was not the result of mere carelessness, inadvertence or inattention on the part of Austal; and

(b) Austal was aware of the Information, that it was not generally available and that it was material.

55 Mr Singleton admits that, that throughout the Contravention Period, he was involved in the contravention of s 674(2) by Austal, such that he contravened s 674(2A) of the Act. Specifically, Mr Singleton admits that:

(a) he was directly knowingly concerned in Austal's contravention within the meaning of s 79(c); and

(b) he was aware of the Information, he knew it was not generally available and that it was material, but failed to bring that information promptly to the Austal board, call a formal meeting of the Continuous Disclosure Committee or to take any other steps to cause Austal to disclose the Information to the market.

56 While it is no part of ASIC's case that Mr Singleton intentionally, wilfully, fraudulently or dishonestly contravened, or was reckless in complying with, any legal obligation under statute or under the general law, Mr Singleton admits that:

(a) the breach of s 674(2A) was not the result of mere carelessness, inadvertence or inattention on his part; and

(b) he was aware of the Information, that it was not generally available and that it was material.

Declaratory Relief

57 Subsections 674(2) and (2A), as in force at the relevant time, were civil penalty provisions pursuant to s 1317E (see item 14). Section 1317E(1) stipulated that, if a Court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention.

58 On the basis of the SOAF and the admissions made in the SOAF and joint written submissions, I am satisfied that Austal has contravened s 674(2) and Mr Singleton has contravened s 674(2A). Pursuant to s 1317E(1), the Court is required to make a declaration of contravention: see *Australian Securities and Investments Commission v Warrenmang Ltd* [2007] FCA 973; 63 ACSR 623 at [31] per Gordon J.

59 In the joint written submissions, the parties also placed reliance on the Court's power to make declarations in s 21 of the FCA Act. The Court's power under that section is discretionary. In the joint written submissions, the parties made reference to the principles governing the exercise of the Court's discretion when exercising that power (referring to *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437-438 and *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 at [70]-[79] per Gordon J). In circumstances where s 1317E is applicable, and the Court is required to make a declaration of contravention, the power in s 21 of the FCA Act and the principles governing its exercise are otiose.

60 Section 1317E(2) stipulated that a declaration of contravention must specify the following:

(a) the Court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention;

(e) if the contravention is of a corporation/scheme civil penalty provision—the corporation or registered scheme to which the conduct related.

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

62 As observed recently by the Full Court in *Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170 in respect of analogous provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (at [183]):

> … Given the interrelationship between ss 12GBA and 12GBB, it is no doubt desirable for declarations made under s 12GBA to describe the contravening conduct with reasonable specificity. That has the benefit that, by virtue of s 12GBA(5), the declaration is conclusive evidence of the matters stated. It is also the case, as stated by the High Court in *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [89], that a declaration that a person has contravened a statutory prohibition should indicate the gist of the findings that identify the contravention. Declarations must be "informative as to the basis on which the Court declares that a contravention has occurred" and "should contain appropriate and adequate particulars of how and why the impugned conduct is a contravention of the Act": *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274 per Gordon J (at [83]). The declaration should accurately reflect the contravening conduct in a concise way: *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881; (2003) 60 IPR 296 per Dowsett J at [260]. Within those parameters, though, the Court has a broad discretion in the framing of declarations.

63 The form of declarations sought by the parties by consent satisfied the above requirements.

Pecuniary Penalties

Statutory basis for imposition of penalties

64 At the relevant time, s 1317G of the Act provided for the imposition of pecuniary penalties. Relevantly, subss (1A) and (1B) of that section provided:

> (1A) A Court may order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum amount if:
>
> (a) a declaration of contravention by the person has been made under section 1317E; and
>
> (b) the contravention is of a financial services civil penalty provision not dealt with in subsections (1E) to (1G); and
>
> (c) the contravention:
>
> (i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
>
> (ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or
>
> (iii) is serious.
>
> (1B) The relevant maximum amount is:
>
> (a) $200,000 for an individual; or
>
> (b) $1 million for a body corporate.

65 Pursuant to s 1317G(1B) of the Act (as in force at the relevant time), the Court is therefore permitted to impose a pecuniary penalty of up to $1 million for a body corporate and $200,000 for an individual if the contravention falls within the scope of s 1317G(1A)(c) of the Act.

66 The parties submit that the contravention was "serious" for the purposes of s 1317G(1A)(c)(iii). The parties rely on the following circumstances.

67 First, Austal had given the EBIT Margin Guidance on 10 December 2015 and reiterated that guidance on 23 February 2016, at the time that it released its FY2016 Half Year Results. In such circumstances, Austal was under a heightened obligation to make corrective disclosure as soon as it became aware that there was no longer a reasonable basis for it to assume that information was correct: see, eg, *TPT Patrol* at [1463]-[1488]).

68 Second, Austal and Mr Singleton were aware during the Contravention Period that information derived from the LCS EAC Review (in particular, the Information as defined above) may

ultimately require disclosure to the ASX. Mr Singleton had been in discussions with JP Morgan since early May 2016 regarding market communications which would be appropriate if Austal was required to announce a material earnings downgrade relating to AUSA, when he first requested JP Morgan to prepare a paper on that topic, which JP Morgan provided to Mr Singleton on about 11 May 2016. Two further papers followed on 18 May and 10 June 2016. Further, from 3 June 2016, when Mr Jason first sent a version of the LCS EAC Presentation Powerpoint slide pack to Mr Singleton, the slide pack raised potential communications with the ASX.

69 Third, by 16 June 2016, Austal and Mr Singleton became aware of the Information, that it was not generally available and that it was material, yet neither Austal nor Mr Singleton took steps to ensure that the Information was immediately disclosed to the ASX. Instead, between 16 June 2016 and 30 June 2016, Austal and Mr Singleton sought to understand the following matters:

(a) the impact of the Information on Austal's cash position;

(b) the reaction of Austal's banking syndicate to the Information and whether Austal would be required to reduce its debt under its banking facilities;

(c) the extent to which the US Navy might be liable to otherwise agree to pay for any of the modifications that Austal was aware at the time would be required on the LCSs; and

(d) the likelihood that LCS 6's performance in the second shock trial might necessitate further design modifications that could cause further EAC increases and exacerbate the extent of the profit writeback.

70 The parties submit, and I accept, that none of those matters provided any lawful justification for refraining from immediately notifying the ASX of the Information.

71 Fourth, Mr Singleton did not at any time between 16 June 2016 and 4 July 2016 attend or call a formal meeting of Austal's Continuous Disclosure Committee to discuss the need for disclosure of the Information and did not bring the Information to the attention of the Austal board until the scheduled board meeting on 28 June 2016.

72 Fifth, when the Information was brought to the board at the 28 June 2016 meeting, the minutes of the board meeting relating to this agenda item stated only that "[t]he matter was discussed" and no decision in relation to the LCS EACs or the profit writeback is recorded in the minutes. There are no minutes or other contemporaneous written record of what was discussed or decided at the further meeting held on 1 July 2016.

73 For these reasons, I accept that the contravention was "serious" for the purposes of s 1317G(1A)(c)(iii) of the Act. The Court's discretion to impose a pecuniary penalty under that section is therefore enlivened.

Principles governing the imposition of an agreed penalty

74 The parties have made joint submissions to the Court as to the appropriate penalties to be imposed in respect of each of the defendants. The Court can receive and, if appropriate, accept a joint submission as to the quantum of penalty to be imposed in civil penalty proceedings: *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 (***FWBII***) at [57]. It is ultimately a matter for the Court to determine whether the proposed pecuniary penalty is appropriate. While the Court's role is not simply to "rubber stamp" a jointly proposed penalty, it is "highly desirable in practice for the court to accept the parties' proposal", provided that the Court is persuaded as to the accuracy of the SOAF and that the proposed penalty is an appropriate remedy in the circumstances: *FWBII* at [58].

75 During the Contravention Period, s 1317G(1A) of the Act did not contain a list of mandatory considerations that the Court must consider in respect of the imposition of civil penalties for a contravention of s 674 of the Act (cf. s 1317G of the Act as amended on 13 March 2019). As such, in determining this application, the parties submit that the Court should have regard to the well-accepted principles applicable to pecuniary penalties generally as well as the factors relevant to the level of penalty for contravention of the continuous disclosure provisions specifically identified in previous cases.

76 The principal object of the imposition of a pecuniary penalty under civil regimes is deterrence, both specific and general: *Australian Building and Construction Commissioner v Pattinson* (2022) 175 ALD 383 (***Pattinson***) at [19] per Kiefel CJ, Gageler, Keane, Gordon, Steward, Gleeson JJ; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 (***ABCC v CFMEU***) at [116] per Keane, Nettle and Gordon JJ, citing *FWBII* at [55]. In *FWBII*, the plurality (at [55]) stated that the purpose of civil penalties "is primarily if not wholly protective in promoting the public interest in compliance" (endorsing the view of French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; ATPR 41-076 (***CSR***) at 52,152).

77 A civil penalty should therefore be fixed with a view to ensuring that the penalty is not such as to be regarded by the contravenor or others as an acceptable cost of doing business: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at [66]

per French CJ, Crennan, Bell and Keane JJ, citing *Singtel Optus v Australian Competition and Consumer Commission* [2012] FCAFC 20; 287 ALR 249 (***Singtel***) at [62]-[63] per Keane CJ, Finn and Gilmour JJ. As Keane, Nettle and Gordon JJ observed in *ABCC v CFMEU* at [116]:

> … if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the raison d'être of its imposition.

78 In fixing a penalty, the Court should have regard to the maximum penalty prescribed by the legislature: see *Markarian v The Queen* (2005) 228 CLR 357. In *Pattinson*, the High Court rejected the relevance of the "notion of proportionality" in the civil penalty context, including the notion that a statutory maximum penalty is intended to be reserved exclusively for the worst category of contravening conduct (see [49]). The maximum penalty is, rather, "but one yardstick that ordinarily must be applied" and must be treated "as one of a number of relevant factors": *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 (***Reckitt Benckiser***) at [155]-[156], cited with approval by the majority in *Pattinson* at [53]-[54].

79 A penalty should nonetheless be "proportionate" in the sense of striking "a reasonable balance between deterrence and oppressive severity" (*Pattinson* at [41], [46]-[47]). The question, therefore, is what is required to achieve deterrence in the specific circumstances of the case.

80 In *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; 234 ALR 511 (***Chemeq***), French J identified the following non-exhaustive list of factors relevant to the level of penalty for contravention of the continuous disclosure provisions (at [99], cited with approval in a number of cases, see e.g. *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 at [23]):

1. The extent to which the information not disclosed would have been expected to and (if applicable) did affect the price of the contravening company's shares: s 674(2)(c).
2. The extent to which the information, if not generally available, would have been discoverable upon inquiry by a third party: s 676(2).
3. The extent (if any) to which acquirers or disposers of the company's shares were materially prejudiced by the non-disclosure: s 1317G(1A).
4. The extent to which (if at all) the contravention was the result of deliberate or reckless conduct by the corporation.
5. The extent to which the contravention was the result of negligent conduct by the corporation.
6. The period of time over which the contravention occurred.

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

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

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

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

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

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

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

81 The size of the contravening company may also be a relevant factor: see *Pattinson* at [18] citing the factors relevant to the assessment of penalty set out by French J in *CSR* at 52,152 - 52,153.

82 As the Full Court observed in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68 at [101], citing the lists of factors identified by French J in *Chemeq* and by Santow J in *Australian Securities and Investments Commission v Adler (No 5)* [2002] NSWSC 483; 42 ACSR 80: "[t]hese lists of factors should not be treated as a rigid catalogue or checklist of matters to be applied in each case; the overriding principle is that the Court should weigh all relevant circumstances".

83 The determination of a civil penalty usually involves a process of "instinctive synthesis" of the relevant matters: *Reckitt Benckiser* at [44]; see also *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; 327 ALR 540 at [6] per Allsop CJ. It is an "inexact science, not subject to rigidity in approach but guided by well-accepted factors": *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55 at [159] per Lee J.

84 Finally, the Court is not usually assisted by the citation of penalties imposed in other cases with different circumstances as establishing an appropriate "range" for the penalty to be imposed: *Singtel* at [60]. Nonetheless, assessments of penalty in analogous cases are capable of providing guidance to the Court in so far as they may ensure parity of treatment of similar circumstances:

"there should not be such an inequality as would suggest that the treatment meted out has not been even-handed" (*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 295; see also *Australian Competition and Consumer Commission v Cornerstone Investment Australia Pty Ltd (in liq) (No 5)* [2019] FCA 1544 at [55] per Gleeson J).

85 The factors relevant to the determination of appropriate penalties in the present proceeding, as submitted by the parties, are addressed in turn below.

Relevant considerations in this case

Seniority of officers involved in the contravention

86 It is significant that a senior officer of Austal was involved in the contravention, namely Mr Singleton, who was Austal's CEO during the Contravention Period.

Duration of contravention

87 The time between Austal's (and Mr Singleton's) awareness of the Information and Austal's shares entering a trading halt on 30 June 2016 was 14 days (10 business days). The time between Austal's (and Mr Singleton's) awareness of the Information on 16 June 2016 and the announcement on 4 July 2016 was 18 days (11 business days).

Compliance policies

88 During the Contravention Period, Austal had a continuous disclosure policy in place. It relevantly provided that:

(a) the CEO, in conjunction with the Company Secretary, will determine whether continuous disclosure obligations require the information to be disclosed to the ASX;

(b) a Continuous Disclosure Committee comprising the CEO and the Company Secretary has been formed; and

(c) a meeting of the Continuous Disclosure Committee may be convened from time to time to consider particular continuous disclosure issues.

Size of the company

89 In FY2015, Austal's total annual revenue was $1,414,888,000 and its total EBIT was $84,803,000. In FY2016, the year in which it booked the profit writeback, Austal's total

revenue was $1,339,970,000.98. Its market capitalisation is currently in excess of $900,000,000.

Market impact and prejudice

90 As observed above, in the period from 16 June 2016 to the imposition of the trading halt on 30 June 2016, 19,178,880 Austal shares with a total value of $23,342,284.61 were traded.

91 After the disclosure was made on 4 July 2016, Austal's share price dropped from a closing price on 29 June 2016 (prior to the trading halt) of $1.21 to an intra-day low of $0.935, closing at $1.11. The trading volume was up on 4 July 2016 by approximately 5.7 million compared to the previous trading day (an increase from approximately 1.4 million shares sold on 29 June 2016 to approximately 7.1 million shares sold on 4 July 2016).

Mitigating circumstances

92 The parties submit that the following matters should be treated as mitigating circumstances.

93 First, neither Austal nor Mr Singleton has been found to have engaged in contraventions of continuous disclosure obligations in the past.

94 Second, Austal and Mr Singleton made efforts to cooperate with ASIC's investigation by responding to notices issued by ASIC, attending and making staff available for compulsory interviews and by seeking pro-actively to understand the nature of ASIC's concerns. Austal and Mr Singleton have cooperated to resolve the proceedings, by agreeing the facts set out in the SOAF, admitting contraventions and joining with ASIC in seeking the proposed relief (including by joint submissions). As a result, Austal and Mr Singleton's admissions have avoided the need for a lengthy trial, and evince contrition.

95 I accept that these matters should be treated as mitigating factors.

Parity

96 The parties drew the Court's attention to a number of cases that involved agreed submissions on penalty in respect of continuous disclosure breaches committed by corporate and individual defendants. I have had regard to those cases, but it is unnecessary to set them out.

Conclusion as to penalty

97 As set out earlier, general and specific deterrence are the principal objects in the imposition of a civil penalty. As ASIC observed in the joint submissions, compliance with the continuous

disclosure provisions is central to the promotion of fair and efficient markets, as the integrity and efficiency of financial markets depends on investors having access to market-sensitive information about listed entities at the same time.

98 I am satisfied that the penalties proposed in this case are sufficient to achieve deterrence in light of the matters (including mitigating factors) considered above. I accept that the circumstances of the present case warrant the agreed penalties being imposed against Austal and Mr Singleton for their respective contraventions.

Conclusion

99 In conclusion, I am satisfied that the form of declarations and the penalties proposed by the parties are appropriate. I have therefore made the declarations sought and imposed pecuniary penalties in the amounts proposed by the parties.

100 The defendants have agreed to pay a contribution to the plaintiff's costs in a lump sum of $500,000. The parties submitted that no other order as to costs should be made. I have therefore made orders to this effect.

I certify that the preceding one hundred (100) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan.

Associate: 

Dated: 14 October 2022